**STATE OF ILLINOIS**
**ILLINOIS COMMERCE COMMISSION**

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| **ILLINOIS BELL TELEPHONE COMPANY** | **)** | |
| | **)** | **Docket No. 01-0614** |
| **Filing to Implement Tariff Provisions Related to** | **)** | |
| **Section 13-801 of the Public Utilities Act** | **)** | |

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# REPLY BRIEF OF AMERITECH ILLINOIS

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# REPLY BRIEF OF AMERITECH ILLINOIS

Illinois Bell Telephone Company ("Ameritech Illinois" or the "Company") hereby submits its Reply Brief in this proceeding.

## I. INTRODUCTION

This proceeding presents a unique challenge because it involves the Commission's construction of new pro-competition legislation in Illinois. The challenge arises mainly from the efforts of CLECs and Staff to expand the legislation beyond its plain meaning or intended purpose. The most glaring example of this is their insistence that the Commission should mindlessly "implement the maximum development" of competition without reflecting upon the deeper issues concerning the type of competition that is best for Illinois consumers. Indeed, only one party offered expert testimony which discusses how to achieve the maximum development of competition and how to distinguish between beneficial competition and unproductive competition. That testimony was offered by Ameritech Illinois witness Dr. Debra Aron. As Dr. Aron explained, the language regarding the "maximum development" of competition cannot be interpreted to give the Commission unfettered discretion to do whatever might be beneficial to individual competitors. Rather, there are well-established economic principles which distinguish between genuine, sustainable competition and competition which may benefit individual competitors but does not encourage efficiency, innovation or investment in facilities.

Dr. Aron made three points along these lines:

1. First, tariff proposals should further the attainment of real, efficient competition. This means that the focus should be on consumer welfare, not the welfare of particular types of CLECs.

2. Second, robust (i.e., "maximum") competition obtains when carriers substantially provide their own infrastructure. It is in the unshared, not the shared portions of the infrastructure that competition is most likely to develop. Moreover, network redundancy should be seen as socially beneficial for its own sake, by contributing to public safety, something to which reseller/UNE-P providers do not contribute at all.

3. Third, innovation, one of the primary consumer benefits of competition, is more substantial when CLECs provide their own networks and make investments in network infrastructure and network personnel. The ability of resale/UNE-P CLECs to innovate at the network level is virtually nil unless and until they provide their own network facilities.

(Am. Ill. Ex. 8.0, pp. 17-18).

Dr. Aron's observations are embedded in Illinois law, which demonstrates a clear preference for increased investment in telecommunications infrastructure. The General Assembly has found that:

> The competitive offering of all telecommunication services will increase innovation and efficiency in the provision of telecommunications services and may lead to reduce prices for consumers, increased investment in communications infrastructure, the creation of new jobs, and the attraction of new business to Illinois.

(220 ILCS 5/13-102(f)). It would be a mistake to assume, as the CLEC do, that the statutory objective to "maximize" the development of competition is served by anything and everything that assists CLECs. Rather, the Commission should adopt the more disciplined, economically sound view offered by Dr. Aron.

The competing economic theory offered by the CLEC Coalition and Staff is summarized in the CLEC Coalition's rule that "the tie goes to the runner" (Jt. CLEC Init. Br., p. 17). They interpret Section 13-801(a) as providing justification for anything and everything that could benefit a CLEC (particularly those CLECs that seek to rely entirely on the ILEC's network). Of

course, that is not supportable standard because it makes no distinction between policies which encourage network investment, efficiency and innovation and those policies which merely benefit individual CLECs.

Although the CLEC Coalition claims that its proposals impartially apply the law ("the CLEC Tariff in no way abuses this discretion but most often simply incorporates the precise language of Section 13-801 in the relevant areas"; Jt. CLEC Init. Br., p. 6), the CLEC Coalition's proposal frequently abuses the plain meaning of Section 13-801. For example, Joint CLEC witness Gillan literally reads the words "ordinarily combines for itself" right out of Section 13-801(d)(3).

- What Section 13-801(d)(3) says: "Upon request, an incumbent local exchange carrier shall combine any sequence of unbundled network elements that it ordinarily combines for itself…"
- What Mr. Gillan says: "Ameritech's obligation, however, is to offer any sequence of network elements that it combines for itself, both now and in the future."

(Jt. CLEC Ex. 1.0, p. 7). Similarly, Mr. Gillan's RAC proposal does not merely "incorporate the precise language" of the statute. In fact, there is absolutely no statutory support in Section 13-801 for the draconian intervals and penalties associated with that proposal. Another example: In the ULS-ST section of the tariff, the CLEC Coalition proposes to re-define shared transport in a way completely inconsistent with established FCC precedent. In short, the CLEC Coalition abuses its self-professed neutrality and is nowhere near the impartial arbitrator it claims to be.

There is also an unfortunate undertone to the comments of the CLEC Coalition which must be put in the appropriate light. First, the CLEC Coalition claims that Ameritech Illinois has "steadfastly refused" to provide the UNE-P and has plans to "frustrate competition." (Jt. CLEC

Init. Br., p. 11). This allegation is unjustified and should in no way color the Commission's reading of the plain language of Section 13-801. This innuendo is unjustified because, as Mr. Wardin explained, CLEC's have won twenty seven percent (27%) of the business access lines in the state of Illinois and twelve percent (12%) of the consumer access lines in the state of Illinois. Thirty five percent (35%) of the CLEC-served consumer access lines are provided by means of the UNE-P. Ameritech Illinois' business continues to decline as competition find new ways to win in the marketplace. These facts belie the CLEC Coalition's unfounded allegations.

A more troubling aspect of the CLEC Coalition's brief is the statement that Ameritech Illinois' tariff should be ignored because the CLECs "already know", based on past history, that all of Ameritech Illinois' tariffs are "defiantly noncompliant." (Jt. CLEC Init. Br., p. 3). The only "evidence" to support this flagrant distortion of facts are two Commission Orders criticizing two of the approximately one thousand tariff filings made by the Company over the last five years. Boiled down to its essence, this unsubstantiated allegation is an invitation to reject out of hand Ameritech Illinois' tariff and to ignore Ameritech Illinois' arguments in this proceeding based upon an alleged displeasure with Ameritech Illinois' tariff in other proceedings. It is difficult to imagine a more prejudicial, legally improper argument. It goes without saying that Ameritech Illinois' constitutional right to due process requires that this Commission reach an impartial resolution of issues based upon the facts in the record. It is improper for any party to argue, either directly or by implication, that the tariffs Ameritech Illinois has filed are not deserving of open and honest consideration. Ameritech Illinois respectfully requests that the Commission in its order explicitly and strongly reject the argument advanced by the CLEC Coalition and disassociate itself from those views.

Staff's and the CLEC Coalition's interpretation of certain provisions of Section 13-801, if adopted by the Commission, would put the Commission on the collision course with the Supremacy Clause of the U.S. Constitution. There is a pervasive scheme of federal telecommunications regulations covering almost all the matters addressed by Section 13-801, including interconnection, collocation, access to UNEs and UNE combinations. In addition, on several of those matters, the Commission is being urged to apply state law in a way which directly conflicts with federal law. Under well-established rules of federal preemption, inconsistency between federal and state rules will be fatal to the state rules, because under the Supremacy Clause of the U.S. Constitution, the federal rules take precedence. Gade v. National Solid Waste Management Ass'n, 505 US 88, 98 (1992). For example, if as the CLEC Coalition urges, the Commission interprets Section 13-801(d)(3) not to include a "necessary" and "impair" standard for defining UNEs, this will contravene federal law and the Commission will inevitable create a preemption issue which it cannot overcome. The same issue applies to Staff's argument that PA-92-0022 has repealed the clear federal requirement that only equipment "necessary" for interconnection or access to UNEs may be collocated inside Ameritech Illinois' central offices. It is a fundamental rule of statutory construction that statutes be construed in a manner which renders them constitutional rather than in a manner which renders them constitutionally invalid. Craig v. Peterson, 39 Ill.2d 191, 233 N.E.2d 345, 351 (1968). For this reason, the Commission should adopt Ameritech Illinois' position that Section 13-801 must always be interpreted to be consistent with federal law. This, after all, is no more than what the legislature has instructed this Commission to do in Section 13-801(a).

Finally, Staff and the CLEC Coalition mistakenly argue that the statute should be liberally construed. (Staff Init. Br., pp. 2-6). (Jt. CLEC Init. Br., pp. 6-7, 17). Staff's brief

contains quotations from the legislative debates in which three senators and one representative express their views regarding the pending legislation, but these statements carry no weight. According to the law, "a statute is not interpreted by its sponsor's comments when introducing legislation, nor is it interpreted by the statements of senators or representatives who voted to pass the legislation." Chicago SMSA Ltd. Partnership v. Illinois Dept. of Revenue, 306 Ill. App. 3d 977, 986, 715 N.E.2d 719, 726 (1st Dist. 1999). Morel v. Coronet Ins. Co., 117 Ill.2d 18,24, 509 N.E.2d 996, 999 (1987).

Although Staff correctly points out that a "remedial" statute should be liberally construed (Staff Init. Br., p. 5), it fails to mention that a strict construction is warranted for statutes that are also penal in nature. In particular, the Illinois Supreme Court has directed that a statute that is both remedial and penal should be construed "with at least a reasonable degree of strictness so as not to include anything beyond the immediate scope and object, even though it be within its spirit. This bars adding anything to the statute by inference or intendment." Acme Fireworks Corp. v. Bibb, 6 Ill.2d 112, 119, 126 N.E.2d 688, 692 (1955).

A statute can be penal if it specifies either the amount of damages that can be awarded for a violation or a formula by which the amount of damages is to be calculated. Namur v. Habitat Company, 294 Ill App. 3d 1007, 1011, 691 N.E.2d 782, 785 (1st Dist. 1998). Section 13-516(a)(2) of the statute does just that – it sets a per violation penalty of "up to $30,000 or 0.00825 % of the telecommunications carrier's gross intrastate annual telecommunications revenue, whichever is greater." 220 ILCS 5/13-516(a)(2). Accordingly, the statutory language – and any obligations it imposes on Ameritech Illinois – should not be construed liberally, as Staff contends, but should be construed "with at least a reasonable degree of strictness." Acme, 6 Ill.2d at 119, 126 N.E.2d at 119.

Ameritech Illinois has incorporated all of its proposed tariff revisions into Attachments 1 and 2 to this Reply Brief. Attachment 2 shows changes to Part 19, Section 19. All other changes are shown in Attachment 1. All proposed changes from the currently effective tariff are shown in legislative style. With the exception of changes to Part 19, Section 19 (revised to apply to reconfiguration of dedicated communication services to UNE combinations) and Part 23, Section 4 (revised to clarify collocation and cross-connect offerings), all of the changes shown in Attachments 1 and 2 were identified in the illustrative tariffs submitted with Ameritech Illinois' testimony and its Initial Brief.

## II. AMERITECH ILLINOIS HAS PROPERLY INTERPRETED AND APPLIED THE REQUIREMENT OF SECTION 13-801(d)(3)

Section 13-801(d)(3) states that, upon request, Ameritech Illinois "shall combine any sequence of unbundled network elements that it ordinarily combines for itself, including but not limited to, unbundled network elements identified" in the Draft I2A. To comply with Section 13-801(d)(3), Ameritech Illinois has revised its tariffs to state that, upon request, the Company will perform the work necessary to provide CLECs with 12 new UNE-P combinations which go beyond those listed in the Draft I2A and encompass all residential and business basic dialtone lines, ISDN lines, centrex lines, and pay telephone lines. (Am. Ill. Ex. 1.0, p. 7; Am. Ill. Ex. 2.0, p. 19; Tr. 229-31). In addition, the Company has proposed a new tariff section under which it will perform the work necessary to provide eight types of enhanced extended link ("EEL") combinations of unbundled local loops and unbundled dedicated transport, designed to enable CLECs with a single collocation arrangement to dramatically increase the number of potential local exchange service customers they can serve on a LATA-wide basis. (Am. Ill. Ex. 2.0, pp. 14- 22). The 20 types of new UNE combinations being offered by the Company more than

satisfy the demands which have actually been made by CLECs (Am. Ill. Ex. 2.0, pp. 19-22), and more than satisfy any appropriate requirements of Section 13-801(d)(3).

To determine the list of new combinations appropriate for inclusion in the UNE-P and EEL tariffs, it was necessary to take into account the limiting phrase "ordinarily combined," as well as the specific UNE combinations listed in the Draft I2A. For the reasons discussed in the Company's Initial Brief (pp. 20-23), Ameritech Illinois believes that at most the phrase should be construed to refer to UNEs combined to provide services offered to residential and small business customers on a widespread or mass market basis. In fact, the combinations offered among the 20 types of new combinations enable CLECs to provide much more than "plain old telephone service."

The CLEC Coalition criticizes Ameritech Illinois' construction of the phrase "ordinarily combined," characterizing it as "unilateral." (Jt. CLEC Init. Br., pp. 18-19). This criticism is disingenuous in light of the fact that Ameritech Illinois' understanding of the term "ordinarily combined" is entirely consistent with the meaning ascribed to that term by CLEC Coalition members in Docket 98-0396. In that docket, which was pending when the General Assembly enacted PA 92-0022, the CLECs argued that Ameritech Illinois should be required to provide combinations of unbundled network elements which it "ordinarily combines" for itself. In support of their position, these parties focused entirely on the alleged need for new UNE combinations to provide "new and second lines" over the UNE Platform in order to have a full opportunity to compete for the provision of service offered on a "mass market basis."

For example, Z-Tel Communications, Inc. ("Z-Tel"), a member of the CLEC Coalition in this case, framed the issue in Docket 98-0396 as follows:

> First, Z-Tel submits that the Illinois Commerce Commission ("Commission") should require Illinois Bell Telephone Company ("Ameritech") to provide new as well as

> existing UNE combinations, including the UNE-P, by adopting an "ordinarily combined" standard to encourage mass market competition in Illinois. Second, Z-Tel demonstrates that Ameritech failed to comply with this Commission's order regarding the provision of unbundled local switching with interim shared transport ("ULS-ST").

(Post-Hearing Brief of Z-Tel Communications, Inc., Docket 98-0396, pp. 1-2) (administrative notice requested) (emphasis added).

Similarly, AT&T and MCIWorldCom, also members of the CLEC Coalition, stated the issue in Docket 98-0396 as follows:

> Ameritech's compliance with the TELRIC Order and the determination of appropriate rates, terms, conditions for non-recurring charges, shared transport and the UNE Platform need to be addressed and resolved to provide certainty with respect to pricing and a solid foundation on which CLECs can rely to serve residential and business customers on a mass market basis in Illinois.

(Initial Joint Brief of AT&T Communications of Illinois, Inc. and MCIWorldCom, Inc., Docket 98-0396, pp. 2-3) (administrative notice requested). Moreover, in the introductory paragraph of the section of their Joint Initial Brief specifically devoted to the issue of the "network elements" that Ameritech Illinois "ordinarily combines in its network," AT&T and MCIWorldcom stated as follows:

> There are two separate and distinct issues that the Examiner and the Commission must address – (1) whether Ameritech is currently obligated to provide UNE Platform for new customers, additional, and second lines and (2) if not, whether Ameritech can be ordered by a state commission to do so.

(Id., p. 4) (emphasis added).

The CLECs' use of the phrase "ordinarily combined" to refer to UNE-P combinations for the provision of mass market services was echoed in the Order issued in Docket 98-0396, where the Commission, citing Section 13-801(d)(3), concluded that Ameritech Illinois should be required to provide CLECs with UNEs which the Company "ordinarily combines for itself or for the use of its end users." The Commission determined that the purpose of requiring Ameritech

Illinois to provide "such combinations is to promote mass market competition for residential and small business customers." Order, Docket 98-0396 at 93 (emphasis added). The Commission further concluded that "this approach was recently adopted by the legislature in PA92-22, which imposes the exact unbundling requirement ('combine any sequence of unbundled elements that it ordinarily combines for itself') that is imposed here." (Id.).[1]

In short, the Company's interpretation of the term "ordinarily combined" as relating to combinations of UNEs to provide services offered to residential and small business customers on a "mass market" basis is fully consistent with the commonly understood meaning of the term at the time that Section 13-801(d)(3) was enacted. It is noteworthy that no party to Docket 98-0396 discussed the term "ordinarily combined" with reference to exchange private line, "point-to-point data services," or high speed data networks targeted to the medium and large business markets.

In this case, the CLEC Coalition makes no attempt to define the term "ordinarily combined," choosing instead to pretend that the term does not exist:

> The Joint CLECs adamantly contend that there is no need to define "ordinarily combined" because if Ameritech combines it for itself it is "ordinarily combined," whether or not the service provided is "widespread" or provided on a "mass market" basis.

(Jt. CLEC Init. Br., p. 18). Of course, to state as the CLEC Coalition does, that anything that "Ameritech combines for itself" is "ordinarily combined" is to effectively read the word "ordinarily" out of Section 13-801(d)(3). If the General Assembly had intended to implement the CLEC Coalition's view of Ameritech Illinois' obligations, it would have drafted Section 13-801(d)(3) to require the Company to "combine any sequence of network elements that it

[1] The Commission's understanding of the term "mass market" is consistent with the FCC's: "Traditionally, the Commission has identified two broad categories of markets for telecommunications services: (1) the mass market, comprised primarily of residential users; and (2) the larger business market, comprised of medium and large business users. Notice of Proposed Rulemaking, CC Docket 01-337, para. 20 (Dec. 20, 2001). (Citing, e.g., WorldCom/MCI Merger Order, 133 FCC Rcd at 18040-41, paras. 26-27) (emphasis added).

combines for itself." The General Assembly, however, limited the combination requirements to "any sequence of unbundled network elements that [Ameritech Illinois] ordinarily combines for itself." The limiting words "ordinarily" and "unbundled" may not be simply ignored as the CLEC Coalition would like. PrimeCo Personal Communications v. Illinois Commerce Commission, 196 Ill.2d 70, 91 (2001) (stating that statute must be construed "so that no term is rendered superfluous or meaningless").

For its part, Staff purports to define the term "ordinarily combined" two different ways in two different tariffs. For the UNE-P tariff, Staff proposes language defining "ordinarily combined" to mean that the "requested combination is of a type ordinarily used or functionally equivalent to that used by the Company or the Company's end users where the Company provides local service." This definition is not particularly helpful because it incorporates the very word ("ordinarily") which is being defined. Furthermore, there is no explanation for, or evidence to support, inclusion of the phrase "functionally equivalent."

For the EEL tariff, Staff correctly makes it clear that an "ordinary combination" does not include a combination that the Company is not required to provide as an unbundled network element. The Staff, however, proposes that the term "ordinarily combined" be defined to include any combination of UNEs requested by a CLEC, with only two extremely limited exceptions: (i) a combination of UNEs which does not exist with respect to any service provided by the Company; and (ii) a combination of UNEs which has occurred only once and will never occur again. (Staff Init. Br., p. 60). By essentially defining the term "ordinarily combined" to mean any sequence of UNEs which are combined more than once, Staff, like the CLEC Coalition, would render the term "ordinary combines" virtually meaningless as a limiting factor.

Staff (Init. Br., p. 56) asserts that the term "ordinarily" should be "construed to bear upon the frequency and conditions under which Ameritech performs the work to combine particular UNEs, not the user or end user services to which those combinations are targeted." Although Staff's observation intuitively makes sense, it begs the question of how "frequently" a particular sequence of UNEs must be combined in order for those UNEs to be "ordinarily" combined. Staff's proposed definition of "ordinarily combined" EELs implicitly assumes that if a sequence of UNEs is combined more than once, such a combination is performed "frequently" enough to be considered "ordinary." Staff's assumption, however, is no more supportable than a claim that, because the Chicago Cubs have made the playoffs three times in the last 20 years, the Cubs "ordinarily" make the playoffs.

On its face, Section 13-801(d)(3) does not identify a particular degree of "frequency" with which a combination be must be performed in order to be "ordinarily combined." Nor does the statute establish a precise formula for determining such a degree of "frequency." Accordingly, Ameritech Illinois believes that it appropriate to view the phrase "ordinarily combined" as a term of art to be construed in light of (i) the meaning of the phrase as it was commonly understood, and as it was being defined by the CLECs, at the time that Section 13-801(d)(3) was enacted (see discussion supra); (ii) the definition of "ordinary" as applied in the context of telephony (Am. Ill. Init. Br., pp. 20-21); (iii) the goals of PA 92-0022 to "encourage competition in the residential market and to declare the business market competitive" (Ryan Letter, p. 21); and (iv) undisputed evidence that the business market for high-speed dedicated point-to-point service is already highly competitive, as evidenced by the extensive fiber backbone facilities controlled by competitive carriers in the Chicago LATA. (Am. Ill. Init. Br., pp. 33-34).

Ameritech Illinois agrees with Staff (Init. Br., p. 55) that, in construing Section 13-801(d)(3), it is also appropriate to consider the goal of promoting the "maximum development of competitive telecommunications services offerings." 220 ILCS 5/13-801(a). A proper interpretation of that goal supports the Company's position. Contrary to the suggestions of the CLEC Coalition and Staff, Section 13-801(a) cannot be interpreted as providing a CLEC carte blanche to obtain whatever it demands from an incumbent. As Dr. Aron, an expert in economics and the telecommunications industry, explained, the term "competition" refers to a market process that maximizes consumer welfare, in the form of innovation, diversity of offerings and pricing, not a process whose main effect is simply to help some carriers and hurt others or to simply maximize the number of nominal rivals. (Am. Ill. Ex. 8.0, pp. 11-12). Thus, "maximizing the development of competitive telecommunications services," as described in Section 13-801(a), must be informed by the consumer welfare criterion.

As discussed by the Company in its Initial Brief (pp. 21-22, 26-28), the Company's interpretation of the term "ordinarily combined" takes into consideration the objectives of the PUA, which emphasize not only the maximization of consumer welfare, but also investment and job creation in Illinois through the promotion of facilities-based competition. (See, e.g., 220 ILCS 5/13-102(f)) (identifying as legislative objectives "reduced prices for consumers, increased investment in communications infrastructure, creation of new jobs, and attraction of new businesses to Illinois"). (220 ILCS 5/13-103(f)) (articulating as a policy goal the "development and prudent investment in advanced telecommunications services and networks that foster economic development of the State"). As Dr. Aron testified, facilities-based competition provides (i) the opportunity for the CLEC to shed its dependence on the ILEC; (ii) network redundancy that can contribute to the public health and welfare, especially during emergencies;

(iii) the greatest opportunity for innovation of both services and operations; and (iv) the greatest opportunity to move from a regulated environment at the wholesale/network level to a market-based competitive environment. (Am. Ill. Ex. 8.1, p. 5).

An unduly expansive interpretation of requirements of Section 13-801(d)(3), such as that espoused by the CLEC Coalition, Novacon and Staff, would relieve CLECs of the need and the incentive to make investments in their own facilities, operations and expertise, thereby resulting in a less diverse network with attendant negative impacts on consumer welfare and public safety. (Id., pp. 6, 29). The General Assembly recognized that undue dependence on the ILEC is inconsistent with the goal of maximizing competition. Specifically, PA 92-0022 established a new section, §13-502(c), for determining whether to reclassify a service as "competitive." This section lists five criteria that the Commission shall consider, the fourth of which is "the extent to which other telecommunications companies must rely upon the service of another telecommunications carrier to provide telecommunications service." (220 ILCS 5/13-502(c)). The obvious premise of this provision is that the greater the reliance on the ILEC's facilities, the less meaningful is the competition it provides, and therefore, the less likely a service is to be reclassified as competitive, all else being equal. Thus, the General Assembly evidently realized that the most substantial and welfare-enhancing form of competition is that resulting when carriers use their own networks, personnel, and expertise rather than relying on the incumbent's, and that is why the Commission is required to consider this factor when evaluating the competitiveness of a service. (Am. Ill. Ex. 8.0, p. 24).

This interpretation of the legislative goals and objectives as they relate to the development of competition and proper interpretation of Sections 13-801(a) and 13-801(d)(3) is also supported by Governor Ryan, who admonished the Commission to be "vigilant in its

enforcement of the Act to ensure substantial investment by all telecommunications companies desiring to do business in our State" (emphasis added). (Am. Ill. Ex. 2.1, pp. 32-33; Ryan Letter, p. 2).

For all the reasons discussed, the criticisms of Staff and the CLEC Coalition regarding the Company's analysis of the phrase "ordinarily combined" are without merit. There are three other arguments regarding the Company's application of that analysis in the proceeding which must be addressed. First, the CLEC Coalition asserts that Ameritech Illinois has only offered UNE-P combinations used to "provide only voice (and not data) services." (Jt. CLEC Init. Br., p. 19). This assertion is incorrect. The list of 12 UNE-P combinations included in Section 15 include combinations used to provide integrated services digital network ("ISDN") services. ISDN is a high-quality, switched digital communications service that provides a standard phone line with the ability to simultaneously transmit voice, data and packet data traffic.

Second, Staff (Init. Br., p. 57) argues that "Ameritech has provided no persuasive evidence that these eight EEL combinations listed in the Draft I2A represent all UNE combinations that Ameritech uses to provide its voice grade, mass market services." Contrary to Staff's assumption, Ameritech Illinois did not include the eight Draft I2A EEL combinations in its proposed tariff because those EELs are "ordinarily combined" by the Company for the purpose of providing service to its retail customers. Rather, those EELs are included because they are UNE combinations listed in the Draft I2A and, therefore, incorporated by reference in Section 13-801(d)(3). (Am. Ill. Ex. 2.1, p. 28). The purpose of the Draft I2A EELs is to enable CLECs with a single collocation arrangement to dramatically increase the number of potential local exchange service customers they can serve on a LATA-wide basis (i.e., without the need to request additional collocation arrangements in other central offices). (Am. Ill. Ex. 2.0, pp. 14-

22). Accordingly, while the eight EELs themselves are not "ordinarily combined" by Ameritech Illinois to provide mass-market services to residential and small business customers, their inclusion in Section 13-801(d)(3) is consistent with the General Assembly's goal of promoting competition in that market. Indeed, the EELs offering does just that.

Finally, Staff argues that the language of Section 13-801(d)(3) makes it "clear that UNEs Ameritech ordinarily combines for itself include the eight [EEL] combinations listed in the Draft I2A, but are not limited to these eight combinations." (Staff Init. Br., pp. 54-55). This statement reflects an incorrect reading of Section 13-801(d)(3). That Section does not require that the Company provide new EEL combinations that include, but are not limited to, the eight EEL combinations listed in the Draft I2A. Rather, that Section provides that Ameritech Illinois is to combine unbundled network elements that it "ordinarily combines for itself, including but not limited, unbundled network elements identified in the" Draft I2A, which includes UNE-P, as well EEL, combinations. As the Company has previously discussed, the 12 UNE-P combinations listed in Section 15 of the Company's proposed tariffs include, but are not limited to, the UNE-P combinations listed in the Draft I2A. Accordingly, Ameritech Illinois' proposed tariffs fully comply with the requirements of Section 13-801(d)(3).

## III. THE STAFF'S AND CLEC COALITION'S PROPOSED REVISIONS TO THE COMPANY'S UNE-P TARIFF SHOULD BE REJECTED

### A. RESPONSE TO STAFF

#### 1. Secured Frame Option

Staff reiterates its proposal that Ameritech Illinois be required to include in its UNE-P tariff language setting forth terms and conditions applicable to the provision of a "secured frame option," i.e., a secured frame room in an Ameritech Illinois central office where CLECs would be able to cross-connect UNEs. Staff argues that such tariff language is necessary to comply

with Section 13-801(d)(1), which requires that unbundled network elements be provided in a manner which allows a requesting CLEC to combine such elements itself in order to provide a telecommunications service. For the reasons discussed in the Company's Initial Brief (pp. 14-16), Staff proposal should be rejected.

In support of its proposal, Staff (Init. Br., p. 47) argues that Ameritech Illinois is required to "offer all of its telecommunications services under filed tariffs pursuant to Section 13-501." Section 13-501 does not support Staff's proposal. Section 13-801 expressly requires Ameritech Illinois to provide collocation service. In compliance with Section 13-801, Ameritech Illinois has tariffed terms and conditions generally applicable to collocation, which can be used by CLECs to combine UNEs. Neither Section 13-801, nor any other provision of the PUA, however, requires the Company to provide a "secured frame option" or any of the other potential technically feasible non-collocation arrangements by which a CLEC may request access to Ameritech Illinois' UNEs. Moreover, these types of arrangements are appropriately the subject of individually negotiated terms and conditions, and not a tariff of general applicability, because the terms and conditions best suited to a particular CLEC will vary based on the CLEC's demand forecast, the types and quantities of UNEs to be combined and central offices involved. (Am. Ill. Ex. 2.1, p. 5).

It is undisputed that Ameritech Illinois offers CLECs methods of access to UNEs, in addition to collocation, for the purpose of combining them. (Am. Ill. Ex. 2.1, p. 4; Am. Ill. Init. Br., p. 14). Such methods have been included in a number of agreements approved by the Commission. (Id.). CLECs may also issue a Bona Fide Request ("BFR") for other technically feasible methods of accessing UNEs. (Am. Ill. Ex. 2.1, pp. 4-6). Accordingly, Ameritech

Illinois fully complies with Section 13-801(d)(1), even though its tariffs do not spell out the terms and conditions of all of the options available to CLECs for combining UNEs.

Staff (Init. Br., pp. 46-47) also asserts that Sections 13-801(d)(1) and 13-801(d)(4) must be read together to require that Ameritech Illinois "allow a requesting carrier to combine network elements to provide a telecommunications service" without collocation. This argument, even if valid, does not, for the reasons discussed above, support Staff's proposal to tariff the "secured frame option." Moreover, while Section 13-801(d)(4) provides that a CLEC may use an unbundled network elements platform to provide end-to-end service without the CLEC's "provision or use of any facility or functionality," that Section says nothing about the means which must be provided to a CLEC to combine network elements under Section 13-801(d)(1) if the CLEC chooses to combine UNEs for itself in order to create a UNE platform.

Furthermore, under the Company's UNE-P Tariff (Section 15), a CLEC does not need to create its own UNE platform. Instead, the CLEC can obtain either a preexisting UNE-P combination or request that the Company do the work of combining a UNE loop and ULS-ST to create a new UNE-P combination. Section 15 further provides that a CLEC is not required to collocate or otherwise use its own "facilities and functionalities" in order to use preexisting and new UNE-P combinations available under that Tariff. Accordingly, the Company's Tariffs fully comply with Section 13-801(d)(4), as well as Section 13-801(d)(1). There is nothing in Section 13-801(d)(1) and/or 13-801(d)(4) which requires Ameritech Illinois to provide (much less tariff) a "secured frame option."[2]

[2] Moreover, there does not appear any particular CLEC demand for the secured frame option, which CLEC Coalition Gillan characterized as "worthless and discriminatory." (Jt. CLEC Init. Br., p. 26). Although Ameritech Illinois does not agree with this characterization, Mr. Gillan's testimony certainly calls into question the need to tariff the secured frame option.

Finally, as discussed in its Initial Brief (Am. Ill. Init. Br., pp. 15-16), the Company presented testimony explaining why the specific tariff language proposed by Staff should be rejected. (Am. Ill. Ex. 2.0, pp. 6-7). Staff fails to respond to that testimony. For all the reasons discussed, Staff's proposed "secured frame option" tariff language should be rejected.

**2. Other Provisions of Staff's Proposed UNE-P Tariff**

At pages 50 to 53 of its Initial Brief, Staff discusses the provisions of its proposed UNE-P tariff other than the secured frame option. The Company addressed these provisions in its Initial Brief (pp. 41-43) and will not repeat that discussion here. The Company does, however, have the following three additional comments in response to Staff's Initial Brief.

First, Staff asserts that the tariff language proposed by AT&T and WorldCom in their Reply Brief in Docket 98-0396 is a "good starting point." There are, however, aspects of the AT&T/WorldCom Tariff, such as the inclusion of the words "functional equivalent" in the definition of "ordinarily combined," which are unsupported by any evidence presented either in Docket 98-0396 or in this docket. The proper "starting point" is the revised Section 15 proposed by the Company in this case, which contains an appropriate listing of all the new UNE-P combinations which Section 13-801(d)(3) could be interpreted as requiring.

Second, Staff has amended its UNE-P tariff, as originally attached to Mr. Graves' direct testimony, to expand the proposals to EELs. Under the proposals of Staff, the Company, and the CLEC Coalition, however, EELs are the subject of a <u>different</u> tariff section (Ill.C.C. No. 20, Part 19, Section 20). Accordingly, the UNE-P tariff need not, and should not, refer to EELs.

Third, as the Company explained in its Initial Brief (pp. 41-42), the list of UNE-P options set forth at Original Sheet No. 3 of Staff's proposed UNE-P tariff contains a number of errors. (Am. Ill. Ex. 2.1, pp. 11-12). Staff (Init. Br., p. 52) asserts that the list "incorporates language

from Ameritech's December 17, 1989 UNE provisioning guide for 'Combined Platform Offering' and provides greater detail on the types of orders Ameritech should accept." As Mr. Alexander testified, however, the information cited by Staff has been corrected on the Company's website. (Am. Ill. Ex. 2.1, p. 12, n. 12). Unlike Staff's list, the list of 12 UNE-P combinations included in the Company's proposed tariff is technically correct, easy to interpret and provides all of the appropriate new combinations that it appears Staff intended to list. (Am. Ill. Init. Br., pp. 41-42).

### B. CLEC COALITION'S PROPOSED UNE-P TARIFF

The CLEC Coalition does not offer any arguments in support of its proposed UNE-P tariff to which Ameritech Illinois did not fully respond in its Initial Brief (pp. 43-49). In his testimony, CLEC Coalition witness Gillan discussed a few of the CLEC Coalition's proposed revisions to the Company's UNE-P tariff, but failed to support many other proposed revisions, on the grounds that the basis for the revisions was "self-evident . . ." Ameritech Illinois presented testimony addressing all of the CLEC Coalition's proposed tariff changes, including those for which Mr. Gillan declined to provide any explanation. The CLEC Coalition's Initial Brief is a repackaging of Mr. Gillan's testimony and, like that testimony, fails to offer any support for many of the CLEC Coalition's proposals. Moreover, the CLEC Coalition fails to respond at all to the Company's rebuttal and surrebuttal testimonies, in which it demonstrated the myriad flaws in the CLEC Coalition's proposal. The CLEC Coalition's proposed UNE-P tariff should be rejected in its entirety.

### C. RESPONSE TO NOVACON

Novacon (Init. Br., pp. 16-17) asserts that the term "platform," as used in Section 13-801(d)(4) is not limited to a combination of loop, switching and transport. As the Company

discussed in its Initial Brief, however, that is precisely how the FCC and this Commission have consistently defined the term "platform." (E.g., UNE Remand Order, ¶ 12; Line Sharing Order, n. 161; Order, Docket 95-0458, pp. 58, 63 (Ill.C.C. June 26, 1996)). This is crucial because, in construing a statutory enactment, the General Assembly is presumed to know existing law, including the body of law existing in administrative regulations. Citizens Utility Company of Illinois v. Illinois Pollution Control Board, 133 Ill. App. 3d 406, 409, 478 NE2d 853, 855 (1985); People v. Warren, 173 Ill.2d 348, 671 NE2d 700 (1996). As a matter of statutory construction, therefore, the term "platform" in Section 13-801(d)(4) means the UNE platform as previously defined by and used in FCC and Commission orders.

Novacon also alleges that Ameritech Illinois has "attempted to limit the service CLECs can provide" through the UNE-P tariff offering. (Novacon Init. Br., pp. 17-18). Again, Novacon provides no support for this allegation. As previously discussed, CLECs may use the platform (of which a switch is an integral part) to provide switch-based services, including services such as ISDN, a switched digital communications service that provides a standard phone line with the ability to simultaneously transmit voice, data and packet data traffic.

## IV. THE MODIFICATIONS TO THE COMPANY'S EELS TARIFFS PROPOSED BY STAFF AND THE CLEC COALITION SHOULD BE REJECTED

### A. RESPONSE TO STAFF

Ameritech Illinois responded to Staff's arguments and proposed tariff relating to EEL in its Initial Brief (pp. 50-58). The Company will not repeat that discussion here, but will address here a specific aspect of Staff's proposal. Staff's arguments regarding the tariffing of EEL migrations are discussed in Section V of this Reply Brief.

Staff's proposed tariff defines an "ordinarily combined" EEL as:

> any combination of the Company's unbundled loop and unbundled dedicated transport network elements the Company ordinarily combines and uses to provide services to a company or company affiliate's end user customer, another telecommunications carrier's preexisting EEL and user customer, a telecommunications carrier's special access end user customer, or a telecommunications carrier's resale end user customer.

(Staff Init. Br., p. 59). Staff argues that Section 13-801(d)(3) requires Ameritech Illinois to perform the work to combine UNEs that meet the Staff's definition of an "ordinarily combined" EEL, as set forth above. Staff also states that all such EEL combinations are considered to be ordinary combinations unless

> (1) the Company does not provide services using such a combination of unbundled network elements, (2) where the Company does provide services using such combinations, such provisioning is extraordinary (i.e., a limited combination of elements created in order to provide service to a customer under a unique and nonrecurring set of circumstances), or (3) the EEL combination contains a network element that the Commission does not require the Company to provide as an Unbundled Network Element.

(Staff Init. Br., p. 60). As previously discussed, Staff's definition of the term "ordinarily combined" as applied to EELs is unduly broad and would essentially render meaningless the term "ordinarily combined," as a term intended to limit the Company's obligation to combine unbundled network elements on behalf of a CLEC.

Staff's proposed tariff language should be rejected for another reason. As indicated by the above quoted language, Staff includes within the definition of "ordinarily combined EELs" unbundled loop and unbundled dedicated transport element combinations used to provide special access service. Staff's proposal in this regard ignores Section 13-801(j) which, as Staff witness Zolnierek recognized, indicates that nothing in Section 13-801 (including 801(d)(3)) is " . . . intended to require or prohibit the substitution of switched or special access services by or with a combination of network elements nor address the Illinois Commerce Commission's jurisdiction or authority in this area." (220 ILCS 5/13-801(j); Staff Ex. 2.1, p. 28). Thus, any obligation to

combine unbundled network elements for the purpose of providing special access service are governed solely by federal law, and not by Section 13-801. Under federal law, the Company has no obligation to combine unbundled network elements on behalf of a CLEC. As the United States Court of Appeal for the Eighth Circuit has held, the "plain language" of Section 251(c)(3) of the 1996 Act forbids any requirement that incumbent LECs combine UNEs for CLECs. (Iowa Util. Bd. v. Federal Communications Commission, 219 F3d. 744, 758-59 (8th Cir. 2000)). Furthermore, the FCC has made it clear that it does not (and cannot) interpret its currently effective rule on combinations ( 47 C.F.R. 51.315(b)) as requiring incumbents to combine unbundled network elements that are "ordinarily combined." (UNE Remand Order, ¶ 18).

Furthermore, for the reasons discussed by the Company (Init. Br., p. 29), "special access" and "private lines" are functionally equivalent, as indicated by the Commission's interconnection rules, which define the terms "special access" and "private line" synonymously to include "all exchange access not utilizing the local exchange carriers and the switches." (83 Ill. Admin. Code § 790.10 (at Am. Ill. Ex. 2.1, p. 60)). For purposes of Section 13-801(j), there is no basis for treating "private lines" any differently than special access based simply upon the difference between the service name or label. (Am. Ill. Ex. 2.0, p. 20; Am. Ill. Ex. 2.1, pp. 60-61; Am. Ill. Ex. 9.0, p. 5). Accordingly, other than the eight EEL combinations listed in the Draft I2A, Section 13-801(d)(3) should not be interpreted to require Ameritech Illinois to perform the work of combining UNE loops and dedicated transport for the purpose of providing either private line or special access service.

### B. RESPONSE TO CLEC COALITION

The CLEC Coalition's proposed EEL tariff should be rejected for the reasons discussed in Ameritech Illinois' Initial Brief (pp. 58-62). The Company will not repeat that discussion here, but will address three specific issues raised in the CLEC Coalition's Initial Brief.

**1. Unbundled Dedicated Transport**

The CLEC Coalition (Jt. CLEC Init. Br., p,. 21) asserts that "Ameritech's definition of dedicated transport, as used in its I2A and imported verbatim into its Section 13-801 tariff, does not comply with the FCC's definition of dedicated transport, which defines Ameritech's minimum unbundling obligations." (Jt. CLEC Init. Br., p. 21). The CLEC Coalition argues that "Ameritech cannot be permitted to rely upon Section 13-801's requirement that it combine, at a minimum, those combinations in the I2A, including EEL combinations, to somehow violate even its minimum federal obligations."

The CLEC Coalition's argument is without merit. Ameritech Illinois fully complies with its obligation to provide UNE dedicated transport in accordance with the FCC's rules and pursuant to its interconnection agreements and tariff. For example, Ameritech Illinois' UNE Transport tariff defines unbundled interoffice transport as:

> Unbundled Interoffice Transport network elements provide transmission paths (also referred to as "facility") to connect central office buildings such as:
>
> - two Company central offices via existing facilities; or
> - a requesting telecommunications carrier's designated central office and the Company central office via existing facilities.

(Ill.C.C. 20, Part 19, Section 12, Sheet 3).

The EEL tariff, on the other hand, defines the <u>combinations</u> of loop and dedicated transport which the Company will combine on behalf of a CLEC. As previously discussed, Ameritech Illinois has no "federal obligation" to combine loops with any form of dedicated

transport on behalf of a CLEC. Iowa Utilities Bd. v. FCC, 219 F.2d 744, 754 (8th Cir. 2000) ("IUBIII") (holding that plain language of the 1996 Act does not permit any requirement that ILECs perform the functions necessary to combine UNEs for CLECs). In the UNE Remand Order (¶ 48), the FCC expressly stated that "we neither define the EEL as a separate unbundled network element nor interpret Rule 51.315(b) as requiring incumbents to combine unbundled network elements that are ordinarily combined." Accordingly, there is no basis whatsoever for a claim that the Company's definition of a new EEL combination violates "federal obligations."

The Company's definition of an EEL complies with Section 13-801(d)(3), which incorporates by reference the Draft I2A. Under the Draft I2A, an EEL is defined as a combination of an unbundled local loop and unbundled dedicated transport, with the transport terminating at a CLEC's collocation arrangement. (Am. Ill Ex. 2.1, p. 56; Am. Ill. Ex. 2.2, pp. 12-13). This definition is consistent with the purpose of the EEL, which is to enable a CLEC with a single collocation arrangement to increase the number of potential customers it can serve by using the EEL to transport unbundled local loop from distant central offices within the LATA back to its collocation arrangement. (Id.). The CLEC Coalition has identified no basis for its proposal to redefine the unbundled dedicated transport component of the EEL by permitting its termination at any and all "other" locations that a CLEC may desire.

**2. Restrictions On Use Of EELs**

Under the CLEC Coalition's proposal, the EEL tariff would contain language, consistent with that proposed by Staff and the Company, indicating that a telecommunications carrier may only request an EEL for the provision of interexchange access service when the carrier can certify, and does so in writing, that the telecommunications carrier uses that EEL arrangement to provide a significant amount of local exchange service to its end user customer pursuant to the

criteria set forth by the FCC in its Supplemental Order Clarification, as may be clarified or modified in subsequent FCC orders. Unlike the Staff and Company proposals, however, the CLEC Coalition's tariff specifies this provision as "interim" and subject to the "clarification that (in Illinois) advanced services and information access services are not to be considered special access." (Jt. CLEC Ex. 2.0, p. 2, Sch. JPG-2, Orig. Sheet No. 6). The CLEC Coalition further proposed that the Commission establish a separate proceeding to address the applicability of the local use test to EELs. For the reasons discussed in Ameritech Illinois' Initial Brief (pp. 58-59), the CLEC Coalition's proposals should be rejected.

In support of its position, the CLEC Coalition (Jt. CLEC Init. Br., p. 22) states that "Section 13-801(j) expressly provides that the Commission may determine the use of combinations of network elements as substitutes for switched and special access services pursuant to a request by a telecommunications carrier." Section 13-801(j) says no such thing. Rather, that Section provides that:

> [N]othing in the in this amendatory Act of the 92nd Circuit Assembly is intended to require or prohibit the substitution of switched or special access services by or with a combination of network elements nor address the Illinois Commerce Commission's jurisdiction or authority in this area.

220 ILCS 5/13-801(j) (emphasis added). Since the General Assembly in Section 13-801(j) expressly disclaimed any intention of addressing the Commission's "authority or jurisdiction" to order the substitution of UNE combinations for special or switched access, and there is no basis to claim that Section 13-801(j) provides the Commission with authority or jurisdiction to "determine the use of combinations of network elements as substitutes for switched and special access services."

In fact, as discussed in the Company's Initial Brief (pp. 58-60), the Commission does not have such "authority or jurisdiction." Under the FCC's Supplemental Order[3] to the UNE Remand Order, "the conversion of special access to EELs is unquestionably lawful where CLECs use special access circuits to provide a significant amount of local exchange traffic, but is unlawful where this condition is not met." In the Supplemental Order (¶ 2) the FCC held that:

> until resolution of our Fourth FNPRM, . . . interexchange carriers (IXCs) may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities (or obtain them from third parties). This constraint does not apply if an IXC uses combinations of unbundled network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.

In the Supplemental Order Clarification[4] (¶ 8) the FCC reaffirmed this clear rule: "[U]ntil we resolve the issues in the *Fourth FNPRM*, IXCs may not substitute an incumbent LEC's unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." (Emphasis added). The FCC also specifically defined the three circumstances under which a requesting carrier is considered to be providing a "significant amount of local exchange service" to a particular customer. Supplemental Order Clarification, ¶ 22.

One basis (but not the only basis) for the FCC's requirements was its concern that allowing CLECs to immediately convert special access arrangements to UNEs would interfere with the FCC's plans for reform of interstate special access charges and universal service by allowing a flashcut of a huge number of special access services to much lower-priced UNE combinations. Such an upheaval could have "significant policy ramifications" for interstate

[3] Supplemental Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC No. 99-370 (rel. Nov. 24, 1999).

access reform and universal service. Id., ¶ 2. The FCC also cited another "independent reason" for placing restrictions on a CLEC's right to order and use EELs. Specifically:

> An immediate transition to unbundled network element-based special access could undercut the market position of many facilities-based competitive access providers. Competitive access, which originated in the mid-1980s, is a mature source of competition in telecommunications markets. We are reluctant to adopt a flashcut approach with potentially severe consequences for the competitive access market without first permitting the development of a fuller record.

Id., ¶ 18.

The FCC made clear that the restrictions it created are mandatory and must stay in place until it completed the Fourth Further Notice of Proposed Rulemaking ("Fourth FNPRM"). Id., ¶¶ 8, 21 (referring to the "temporary constraint" that CLECs "must" meet the requirements it has created) (emphasis added); Supplemental Order, ¶ 2 (CLECs "may not" convert special access to UNEs without meeting FCC requirements) (emphasis added). The Fourth FNPRM proceeding is not yet complete. Indeed, the FCC recently reiterated that the special access conversion requirements are still in full force in Net2000 Comms, Inc. v. Verizon, FCC File No. EB-00-018, FCC 01-381, ¶ 33 (rel. Jan. 9, 2002) (finding that Verizon was justified in refusing to convert certain special access circuits to EELs; the requested circuits were "ineligible for conversion because those circuits were subject to the significant amount of local exchange service requirement articulated in our *Supplemental Order* and . . . our *Supplemental Order Clarification*") and in the UNE NPRM[5], ¶ 71 (noting the continued "safe harbor provisions" on "requesting carriers' access to EEL combinations"). The issues in the Fourth FNPRM have now been incorporated into the UNE NPRM, which was initiated on December 20, 2001. UNE NPRM, ¶ 12.

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[4] Supplemental Order Clarification, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC No. 00-183 (rel. June 2, 2000).

The CLEC Coalition (Jt. CLEC Init. Br., p. 23) asserts that "CLECs have already briefed the Commission that, in Illinois, there is no conceivable linkage between universal service (or any social policy) and limiting an entrant's use of an EEL." This is an apparent reference to the argument made by AT&T and MCIWorldCom in Docket 98-0396 that because the FCC based its restrictions on concerns about universal service funding, and because "the Illinois Commission has already addressed access charge reform and is ahead of the FCC in this respect," the Commission may ignore the FCC's requirements. (Jt. CLEC Br. on Exc., pp. 2-4, Docket 98-0396). The FCC's restrictions on the conversion of pre-existing special access circuits to EELs clearly apply, by their express terms, until such time as the FCC completes its evaluation of national policy issues in the Fourth FNPRM proceeding, not until a state completes its own intrastate access charge reform. Supplemental Order Clarification, ¶ 8 ("until we resolve the issues in the *Fourth FNPRM*, IXCs may not substitute an [EEL] for special access services unless they provide a significant amount of local exchange service"). Simply put, there is no way that any state commission could be "ahead of the FCC," as AT&T and WorldCom claimed, with respect to the FCC's own ongoing rulemakings.[6]

The Commission has also repeatedly and consistently recognized that the restrictions established by the FCC in the Supplemental Order and the Supplemental Order Clarification are binding rules to which the Commission must adhere. E.g., Focal Arbitration Award[7] at pp.12-15

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[5] Notice of Proposed Rulemaking, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Dockets 01-338, 96-98, and 98-147, FCC 01-361 (rel. Dec. 20, 2001) ("UNE NPRM").

[6] Even if the Commission were to accept the CLEC Coalition's arguments, the Commission's authority could be to remove the FCC's restriction for intrastate special access arrangements only, as those would be the only arrangements for which access charge reform had theoretically been "completed" and over which this Commission has any jurisdiction. That, of course, would lead to even more complexity in this area, as many circuits are used for both interstate and interstate special access, and are formally designated as interstate if more than 10% of the traffic they carry is interstate. See Supplemental Order Clarification, ¶ 26, n. 75.

[7] Arbitration Decision, Focal Communications Corp. of Illinois Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, Docket No. 00-0027 (May 8, 2000) ("Focal Arbitration Award"). **[Cite.]**

(Applying FCC orders because "[h]ere, the FCC, for whatever reason, has tied the LEC's obligation to unbundle a special access circuit to the CLEC's obligation to provide significant amounts of local exchange service to a particular customer."); TDS Arbitration Award[8] at p. 17 ("The Commission agrees with Ameritech on the point that the FCC [in the Supplemental Order Clarification] prohibits CLECs from combining UNEs with ILEC's tariffed services (except collocation)").

The CLEC Coalition (Jt. CLEC Init. Br., p. 23) asserts that "the Commission Order in Docket 98-0396, now on rehearing [sic], rejects Ameritech's position that EELs must conform to a 'predominantly local' test." This assertion is wrong. In fact, the Order issued on October 16, 2001 in Docket 98-0396 does not even address the issue. Moreover, the Commission declined to adopt replacement language proposed by AT&T/MCI in their Joint Brief on Exceptions (pp. 2-3) which would have expressly adopted the AT&T/MCI position that Ameritech Illinois should be required to make EELs generally available as UNEs without regard to the local use limitations imposed by the FCC. (Id.). An issue currently addressed on reopening in Docket 98-0396 is whether the FCC's limitations should apply to EELs on an interim basis pending a final decision in this case. The Company and Staff have filed Briefs on Exceptions to the Proposed Order on Reopening explaining that, for the reasons discussed above, the Commission may not disregard the FCC's Supplemental Order and Supplemental Order Clarification even on an interim basis.

### 3. Commingling Of UNEs And Special Access Services

The CLEC Coalition (Jt. CLEC Init. Br., p. 22) reiterates its proposal to include in the EEL tariff a "shared usage" provision that would permit the UNEs and access services to share

[8] Arbitration Decision, TDS Metrocom, Inc. Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company d/b/a Ameritech Illinois Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. 01-0338 (August 8, 2001) ("TDS Arbitration Award").

the same physical facilities (Jt. CLEC Ex. 2, p. 26, Sch. JPG-2, Sheet 7), but provides no argument to support its proposal. As the Company discussed in its Initial Brief, the FCC has expressly rejected the type of "co-mingling" recommended by the CLEC Coalition. In the Supplemental Order Clarification (¶ 28), the FCC stated:

> We further reject the suggestion that we eliminate the prohibition on "co-mingling" (i.e. combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above. We are not persuaded on this record that removing this prohibition would not lead to the use of unbundled network elements by IXCs solely or primarily to bypass special access services. (Footnote omitted.)

(Am. Ill. Ex. 2.1, p. 42). The Commission has previously recognized that the prohibition on "commingling" is a binding rule to which the Commission must adhere. TDS Arbitration Award[9] at p. 17 ("The Commission agrees with Ameritech on the point that the FCC [in the Supplemental Order Clarification] prohibits CLECs from combining UNEs with ILEC's tariffed services (except collocation)."). The FCC recently reaffirmed its rule prohibiting "co-mingling" of UNEs and access services in Net2000 Comm, Inc. v. Verizon, FCC File No. EB-00-018, FCC 01-381, ¶ 33 (rel. Jan. 9, 2002) (finding that Verizon was justified in rejecting a request for conversion of otherwise EEL-eligible circuits which connect to circuits which are not eligible for conversion).

### C. RESPONSE TO NOVACON

In its Initial Brief, Novacon argues that Ameritech Illinois' proposed EEL tariff is improperly defines or restricts the use of EELs. First, Novacon argues that Ameritech Illinois has improperly attempted to "expand the plain language" of the FCC's Supplemental Order Clarification to apply the "local use test" established in that order to "requests for EELs to

[9] Arbitration Decision, TDS Metrocom, Inc. Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company d/b/a Ameritech Illinois Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. 01-0338 (August 8, 2001) ("TDS Arbitration Award").

provide new circuits." (Novacon Init. Br., pp. 10-11) (emphasis original). Novacon asserts that the requirements of the Supplemental Order Clarification apply only to the conversion of existing special access service.

Novacon's argument is without merit. The FCC's restrictions apply equally when Ameritech Illinois is required to physically combine UNEs that were not already connected to create a new EEL.[10] The FCC restricted the use of EELs to those carriers providing significant amounts of local exchange service partly out of its "concern that allowing requesting carriers to use loop-transport combinations solely to provide exchange access service to a customer, without providing local exchange service, could have significant policy ramifications because unbundled network elements are often prices lower than tariffed special access services" and thus "universal service could be harmed." Supplemental Order Clarification, ¶ 2. The FCC made clear that this concern was not limited to the "conversion" of special access arrangements, but was directed at any use of loop-transport UNE combinations in place of special access arrangements: "[P]ermitting the use of combinations of unbundled network elements in lieu of special access services could cause substantial market dislocations and would threaten an important source of funding for universal service." Id., ¶ 7. If the Commission were to ignore the FCC's EEL restrictions, requesting carriers will use EELs instead of special access arrangements when providing exchange access services. This is the very situation the FCC's Orders are intended to prevent. It is thus clear that under the FCC's rules, requesting carriers may not use EELs,

[10] Although the Supplemental Order and the Supplemental Order Clarification do refer to the "conversion" of pre-existing special access arrangements, the FCC did not limit its rules to such conversions, but held more generally that requesting carriers cannot use EELs "in lieu of" special access arrangements. Supplemental Order Clarification, ¶ 7. The FCC's emphasis on "conversions" is easily explained. These FCC Orders were issued after the Eighth Circuit held in IUB I that the FCC cannot require ILECs to combine network elements for CLECs. Iowa Utils. Bd. v. FCC, 120 F.3d 753, 813 (8th Cir. 1997). Thus these orders were promulgated under current federal law, which gives CLECs no right to order new EEL combinations, and the only way a requesting carrier could demand an EEL was through a conversion from an existing special access arrangement.

whether "new" or not, in lieu of special access services when providing exchange access service, but must satisfy the "significant amount of local exchange service" test established by the Supplemental Order Clarification (see ¶ 22).

Second, Novacon argues that the EELs tariff improperly limits the EELs to circuit switched voice or packet switched applications, a restriction for which Novacon claims "there is no support in state or federal law." In support of its argument, Novacon cites a provision of Section 13-801(d) which states that the ILEC shall provide nondiscriminatory access to network elements "for the provision of an existing or new telecommunications service."

Novacon's argument misses the boat. Ameritech Illinois' tariffs do not restrict a CLEC's access to unbundled network elements for the provision of voice or data service. The EELs tariff defines the combinations of loop and dedicated transport which the Company will combine on behalf of a CLEC. As discussed above in response to a similar argument made by the CLEC Coalition, Ameritech Illinois has no "federal obligation" to combine loops with any form of dedicated transport on behalf of a CLEC. Accordingly, there is no basis whatsoever for a claim that the "circuit switched or packet switched" restriction violates federal law. With respect to state law, the "circuit switched or packet switched" restriction is an integral condition of the EEL combinations listed in the Draft I2A and, therefore, comports with Section 13-801(d)(3)'s directive to provide those combinations. (Am. Ill. Ex. 2.2, p. 13).

Finally, Novacon (Init. Br., pp. 9-10) argues that restrictions on the ability of a CLEC to resell an EEL to another telecommunications carrier is not permitted by the UNE Remand Order. The language from the UNE Remand Order quoted by Novacon does not support its position. In the language quoted by Novacon, the FCC indicated that an ILEC shall not impose limitations on

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Nevertheless, the express language of the FCC's Orders, and the FCC's intent, clearly apply not just to "conversions" but to the use of EELs "in lieu of" special access services to provide exchange access service.

the use of UNEs that would impair the ability of a requesting CLEC to offer a "telecommunications service." The 1996 Act defines "telecommunications services" as the offering of "communications" "directly to the public." 47 U.S.C. 153(46). "Telecommunications" is defined as transmission between points specified by a user. 47 U.S.C. § 153(43). Based on these statutory definitions and the FCC's regulations, a CLEC that purchases a UNE is entitled to use that UNE to provide any telecommunications service directly to the public, but is not entitled to "resell" the UNEs to other carriers.

### D. RESPONSE TO GLOBALCOM

In its brief, GlobalCom, Inc. ("GlobalCom") takes issue with the statement in Ameritech Illinois' Interim Compliance Tariff that an EEL terminates "to a telecommunications carrier collocation arrangement in another central office." (GlobalCom Init. Br., p. 1). GlobalCom argues that that language is improper because it allegedly denies "those CLECs who have opted to invest in their own switch facilities within a LATA the opportunity to use the EELs platform unless they elect to interconnect, through collocation, at more than one point within the LATA." (Id., pp. 1-2). GlobalCom asserts that this violates the single point of interconnection ("SPOI") rule Section 13-801(b)(1)(B).

GlobalCom's assertions are unsupported by the testimony of any witness and, for this reason alone, should summarily rejected.[11] Furthermore, GlobalCom's argument makes no sense because it is confusing two distinct concepts: interconnection and access to UNEs. Interconnection is "the linking of two networks for the mutual exchange of traffic." (47 C.F.R. Section 51.5). There is no question that GlobalCom may interconnect with Ameritech Illinois at a SPOI. (220 ILCS 5/13-801(b)(1)(B)). Access to UNEs is a different matter. When a CLEC

[11] GlobalCom did not sponsor any witnesses in this proceeding and did not cross examine the witnesses for any other parties.

purchases UNEs, it is the CLEC's responsibility to access the UNEs where they exist. There is no obligation for the ILEC to bring the UNE to the CLEC.[12] GlobalCom is flatly wrong when it argues that Ameritech Illinois is obligated to deliver UNEs to GlobalCom at its SPOI.

There is also no merit to GlobalCom's suggestion that the provisions of the Company's EEL tariffs somehow violate Section 13-801(d)(4), which contains language applicable to a telecommunications carrier's use of a "network elements platform." As the Company discussed in its Initial Brief, the term "platform," as used in Section 13-801(d)(4), refers to a combination of an unbundled loop and unbundled local switching with shared transport used for the purpose of providing switched traffic. Contrary to GlobalCom's suggestions, the statute does not refer to, much less impose upon Ameritech Illinois an obligation to provide, a so-called "EELs platform."

Furthermore, the terms of the Company's proposed EEL tariff fully comply with Section 13-801(d)(3), which incorporates by reference the UNE combinations listed in the Draft I2A. As previously discussed, under the Draft I2A, an EEL is defined as a combination of an unbundled local loop and unbundled loop dedicated transport, with the UNE transport terminating at a CLEC's collocation arrangement. (Am. Ill. Ex. 2.0, p. 56; Am. Ill. Ex. 2.2, pp. 12-13). This definition is consistent with the purpose of the EEL, which is to enable a CLEC a single collocation arrangement to increase the number of potential customers it can serve by using the EEL to transport unbundled local loop from distant central offices within the LATA back to its collocation arrangement. (Id.). There is no basis for the proposals of GlobalCom and the CLEC Coalition to redefine the EEL and the unbundled dedicated transport component of the EEL by permitting its termination at all "other" locations.

[12] Under Section 13-801(d)(4), a CLEC may purchase a UNE "platform" without the use of the CLEC's own "facilities" or "functionalities." This appears only in the limited case of UNE platforms consisting of loop, switch

## V. AMERITECH ILLINOIS COMPLIES WITH FEDERAL AND STATE REQUIREMENTS GOVERNING ACCESS TO UNES AND COMBINATIONS OF UNES FOR THE PROVISION OF PRIVATE LINES, OR "POINT-TO-POINT" DATA SERVICES

In its Initial Brief (p. 3), Novacon, LLC ("Novacon") argues that "Ameritech's tariff restricts CLECs like Novacon from offering their services – i.e., dedicated local point-to-point data facilities utilizing UNEs." In fact, Ameritech Illinois does not prevent Novacon or any other carrier from providing "point-to-point" data services.[13] First, any CLEC, including Novacon, is free to order UNEs needed to create point-to-point data circuits and combine those UNEs for itself. Second, if a carrier is already purchasing a tariffed "private line" service that is entirely local in nature, the carrier may convert that circuit to UNEs for the provision of point-to-point data services pursuant to FCC Rule 315(b). 47 CFR § 51.315(b). Third, Ameritech Illinois will fill requests for the conversion of existing UNE loop-transport combinations used to provide non-local service if the requesting carrier certifies that it meets one of the three local usage criteria established by the FCC in its Supplemental Order and Supplemental Order Clarification.

Novacon's confuses the issue of what *new* UNE combinations Ameritech Illinois is required to combine under Section 13-801(d)(3) with the issue of what *existing* UNEs or UNE combinations it may provide. The term "ordinarily combines" applies only to the issue of when Ameritech Illinois must, under Section 13-801(d)(3), do the work to create *new* UNE combinations on behalf of a CLEC. For the reasons previously discussed, the Company is not required by Section 13-801 to combine UNEs used to provide DS1, DS3 and higher speed data circuits discussed by Novacon.

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and transport.

[13] Novacon also suggests that Ameritech Illinois has refused to provide to Novacon an arrangement which is available to Ameritech Illinois' affiliate, AADS. This is incorrect. As Mr. Wardin indicated, AADS uses a tariffed transport service (not UNEs) from its collocated DSLAMs to its ATM switch location. (Tr. 201). This service is available to Novacon. Mr. Wardin did indicate that AADS purchases UNE HFPL interconnected to its

In its brief (Staff Init. Br., pp. 67-69), Staff asserts that the tariff proposed by the Company for the conversion of special access service to UNE combinations does not encompass terms and conditions for migration of private line service to UNEs. As previously discussed, under Section 13-801(j) it is federal law, not state law, that governs the substitution of UNE combinations for special access in private line service. Federal law establishes well-defined criteria for this conversion and a tariff is not a prerequisite for accepting a CLEC's request to convert qualifying special access services or private line services to UNE loop-transport arrangements.

Nonetheless, in order to address Staff's concerns, the Company is proposing revisions to Ill.C.C. No. 20, Part 19, Section 19 to explicitly establish terms and conditions applicable to the conversion of existing private line service to UNE loop-transport combinations. Those revisions are included in the draft tariff attached to this Reply Brief. As indicated in Section 19, as revised, an existing private line circuit that is entirely local in nature will be converted to combinations of UNEs without reference to the local usage test set forth in the Supplemental Order Clarification.

Novacon and Staff both suggest that the local usage criteria established in the Supplemental Order Clarification do not apply to requests for the conversion of point-to-point data circuits which are not used to provide "special access" services. (Novacon Init. Br., pp. 10-16; Staff Init. Br., pp. 64-66). In support of its position, Novacon indicates that the FCC has "discussed private line and special access services as separate services" that use loop and dedicated transport combinations. This observation misses the point. In the Supplemental Order Clarification, the FCC evaluated the use of loop-transport combinations used not merely in the

collocated DSLAM. (Tr. 198). This UNE is also available on a non-discriminatory basis to non-affiliated CLECs.

special access market but more generally in the "exchange access market." Supplemental Order Clarification, ¶¶ 3, 10, 13 et. seq. Exchange access services are defined as services provided between exchange areas. 47 U.S.C. Section 153(16) Special access circuits and private line circuits can be used in this manner, and thus both are subject to the Supplemental Order Clarification's local usage test if such circuits are used on any basis other than a purely local one. Contrary to Staff's suggestion, this conclusion is not contradicted by the FCC's description of the restriction as applying to interexchange carriers, since that term would apply to any carrier providing non-local, interexchange service, including interexchange service carried over a private line, or "point-to-point" data circuit.

Novacon (Init. Br., p. 12) suggests that the sole basis for the FCC's "local usage" restrictions was its concern for special access revenues. As the Company discussed in its Initial Brief (p. 59), however, the FCC also made it clear that its restriction on the use of loop-transport combinations is supported by a number of other considerations as well. Supplemental Order Clarification, ¶ 8. For example, as discussed above in response to the CLEC Coalition's argument regarding the EEL tariff, the FCC expressed concern that "an immediate transition to unbundled network element based special access could undercut the market position of many facilities based competitive access providers." This concern supports application of the FCC's local usage test to the conversion of loop-dedicated transport combinations used to provide interexchange service whether or not that combination terminates at an IXC point of presence.

Finally, Novacon argues that high speed point to point data traffic between users in the same state is intrastate for jurisdictional purposes. (Novacon Init. Br., p. 13). Again, Novacon misses the point. The crucial distinction regarding conversion of dedicated services is whether the service is a "local" service or an "exchange access" service. Exchange access can be

interstate or intrastate. Novacon also argues that conversion of dedicated services is permissible under the FCC's rules where those services are used to construct a "LAN" (local area network). Theoretically, it is possible that all traffic on a local area network would be entirely local and that users would not be able access the internet through the LAN, but that would be an extremely rare situation. It is almost always the case that traffic on a LAN originates and terminates in different exchanges (and is therefore carried by exchange access circuits) or that users of a LAN are given access to the internet via the LAN (and therefore the traffic on the LAN is interstate).

Novacon's argument concerning the enhanced service provider exemption seriously misconstrues the law. That exemption applies only *to enhanced service providers* that purchase services from Ameritech Illinois. It does not apply to CLECs such as Novacon because they are obviously *carriers* -- not enhanced service providers. More important, the fact that enhanced service providers are exempt from certain access charges does not change the fact that the services they purchase are interstate in nature. As the FCC observed, "That the Commission exempted ESPs from access charges indicates its understanding that they in fact use interstate access services; otherwise, the exemption would not be necessary". ADSL Order; para. 21. Accordingly, services subject to the ESP exemption are by definition interstate access services and are subject to the FCC's rules in the Supplemental Order Clarification.

## VI. AMERITECH ILLINOIS' PROPOSED ULS-ST TARIFF IMPLEMENTS SECTION 13-801 IN A JUST AND REASONABLE MANNER

### A. STAFF AGREES THAT AMERITECH ILLINOIS' CHANGES TO ITS ULS-ST TARIFF ARE JUST AND REASONABLE

Staff proposed four changes to Ameritech Illinois' tariff. Ameritech Illinois agreed to those changes, with slight modifications. (Am. Ill. Init. Br., pp. 72-73). Staff's Initial Brief

makes clear that these modifications are acceptable and that Ameritech Illinois and Staff now concur on the language for the ULS-ST tariff. (Staff Init. Br., pp. 71-74).[14]

Staff did not address the issue of whether Ameritech Illinois can continue to charge access rates for local switching when it terminates a toll call originated by a CLEC using the UNE Platform. (Am. Ill. Init. Br., pp. 64-68). Given that this was a prominent issue in the testimony and that Ameritech Illinois thoroughly rebutted Staff's position on this issue, Ameritech Illinois assumes that Staff's silence on this issue in the briefs is concurrence with the Ameritech Illinois position.

The only area of apparent disagreement between Ameritech Illinois and Staff involves an issue which Staff has raised for the first time in the Attachment to its Initial Brief. Without any discussion in the text of its brief, Staff proposes to delete the underlined language below:

> Unless otherwise provided in an interconnection agreement or amendment thereto between the Company and a telecommunication carrier which is dated after June 30, 2001, telecommunication carriers that already have an interconnection agreement with the Company pursuant to Section 252 of the Telecommunications Act of 1996 shall be permitted to purchase ULS-ST under this tariff.

Ill. C.C. No. 20, Part 19, Section 21, Sheet 1. The CLEC Coalition did not object to this language. (Jt. CLEC Init. Br., Attachment 1, Part 19, Section 21, Sheet 1). The underlined language should remain in the Ameritech Illinois tariff because carriers may voluntarily agree to purchase ULS-ST *exclusively* pursuant to the terms of an interconnection agreement. Where Ameritech Illinois and a CLEC have reached such an agreement, the CLEC must honor that agreement and cannot breach its contract and purchase ULS-ST pursuant to the terms of the

[14] There is a slight discrepancy in the language Ameritech Illinois proposed for Ill. C.C. No. 20, Part 19, Section 21, Sheet 6 regarding the routing of ULS-ST traffic over the Ameritech Illinois network. Ameritech Illinois concurs with Staff's language and agrees that the language to be added should read as follows: "All interexchange services will be routed in the manner specified by the requesting carrier. The requesting carrier may specify whether its interexchange services are to be routed over Ameritech Illinois' intraLATA interexchange facilities or over another designated interexchange network." (See, Am. Ill. Init. Br., p. 71; Staff Initial Brief, pp. 73-74).

tariff. In an identical situation in Docket No. 99-0379, this Commission held that MCI could not invoke filed tariffs that contradicted a valid and binding interconnection agreement: "Such a result would undermine the integrity of the contract and the process of which it is a part, and would frustrate the federal scheme favoring individual negotiated agreements under the Telecommunications Act." Order, at pp. 33-34.

Of course, under Ameritech Illinois' proposal this applies only to CLECs entering into a voluntarily negotiated interconnection agreement after June 30, 2001. Those CLECs are not prejudiced by Ameritech Illinois' language because they were aware of their rights under Section 13-801 and were therefore in a position to voluntarily pursue those rights in an interconnection agreement. CLECs with interconnection agreements or ULS-ST amendments dated prior to June 30, 2001 could, under Ameritech Illinois' proposed language, purchase ULS-ST from the tariff.

Staff's proposal should also be rejected because it is tardy. Staff proposed this modification for the first time in its initial brief – long after all other parties (and Staff itself) presented their tariff proposals in direct and rebuttal testimony. Ameritech Illinois has been unfairly prejudiced because it was unable to address this proposal in testimony or in the initial brief. Staff should not be permitted to revise its language at the last minute where, as here, it substantially changes the obligations on Ameritech Illinois.

### B. ULS-ST Issues Raised By The CLEC Coalition Should Be Rejected

#### 1. Normal Switched Access Rates Apply To All Toll Calls

The CLEC Coalition continues to argue that when its end user served by the UNE Platform makes a toll call to an Ameritech Illinois customer, Ameritech Illinois must charge UNE-based rates (and not normal switched access rates) for the terminating local switching. (Jt.

CLEC Init. Br., p. 23). The CLEC Coalition is wrong. When Ameritech Illinois terminates a toll call made to one of its end users, the terminating function provided by the switch is not an "unbundled network element." Local switching is an unbundled network element as defined in 51.319(c) only when it is used to provide *local* exchange service – hence the label "*local* circuit switching capability." When switching is used to terminate a toll call, it falls well outside this definition of local service.

Nor is switching that is used to terminate a toll call part of any UNE Platform. If, as the CLEC Coalition asserts, UNEs are defined by whether a network element is part of an "end to end service", it would completely do away with well established federal law that UNEs are defined pursuant to "necessary" and "impair" standard. Under the CLEC Coalition's approach, any network element is a UNE as long as it is used in any Ameritech Illinois "end to end" service. Obviously, such a broad definition cannot stand because it would encompass all Ameritech Illinois network elements and would do away with any meaningful criteria for defining UNEs. "End to end" does not define what is included within the UNE Platform; rather, it describes how a UNE Platform can be used.

Moreover, as Ameritech Illinois demonstrated in its Initial Brief and discussed above in response to Novacon's arguments regarding the UNE-P tariff, a UNE "platform" has been defined by the FCC to mean the combination of loop, port and transport, and this Commission has concurred in that approach. (Am. Ill. Init. Br. pp. 66-67). Because the General Assembly is presumed to know existing law, including the body of law existing in administrative regulations, the term "platform" in Section 13-801(d)(4) means the UNE platform as previously defined by and used in FCC and Commission orders.

Finally, the CLEC Coalition position would violate Section 13-801(j) which preserves the status quo which currently prohibits the substitution of UNEs for switched access service. It is also inherently discriminatory because it would allow CLECs using the UNE Platform to terminate toll calls at lower rates than facility-based CLECs and IXCs with whom they compete. (Am. Ill. Init. Br., pp. 64-68).

**2. Section 13-801 Cannot Override The FCC's "Switch Carve Out"**

The CLEC Coalition argues that Section 13-801 overrides the FCC's express finding that unbundled local switching does not meet the "necessary" and "impair" test for customers with four or more lines in certain areas of the top 50 MSAs where the EEL is also available. (Jt. CLEC Init. Br., pp. 24-25). CLEC Coalition is wrong on at least two counts.

First, FCC Rule 51.317 expressly mandates that "[A] state Commission *must comply* with the standards set forth in this Section 51.317 when considering whether to require the unbundling of additional network elements" (emphasis added). This express obligation to apply the "necessary" and "impair" test when evaluating UNEs applies equally to state Commission action and state legislative action. Accordingly, the FCC's "switch carve-out", which is based on the FCC's application of the "necessary" and "impair" test, cannot be overruled by Section 13-801 or the Commission. The CLEC Coalition argument is nothing more than an invitation for this Commission to take a position which would be clearly preempted by federal law. This Commission should refuse that invitation and should instead construe the statute wherever possible to be consistent with the Supremacy Clause of the U.S. Constitution. Villegas v. Board of Fire and Police Comm'rs, 167 Ill. 2d 108, 124; 656 N.E. 2d. 1074 (1995).

Second, competitive local switching services are freely available in the top fifty MSAs and CLECs are able to serve business customers on a fully competitive basis without regard to

the availability of unbundled local switching. The FCC found that CLECs have ubiquitously deployed switching and that they do not need to buy it from CLECs. Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (Rel. Nov. 5, 1999) ("UNE Remand Order"). Moreover, CLECs have effectively won approximately twenty-seven percent (27%) of the business access lines in the state without using unbundled local switching. (Am. Ill. Ex. 1.1, Schedule 1). These facts completely undermine the CLEC Coalitions assertion that unbundled local switching is crucial to their ability to serve large business customers. Dr. Aron succinctly states in her testimony:

> Lest we forget, removing a UNE from the list of unbundled network elements is a *positive* development for competition in telecommunications. It is a goal and a milestone that the Commission's policies should strive to achieve. It is an indication that a particular element is not a bottleneck and that competitors can obtain alternatives through self-supply or third parties. Such a development replaces regulation with the marketplace, as the PUA envisions, and rewards those carriers who had the foresight and expertise to have prudently invested in their own facilities.

(Am. Ill. Ex. 8.1, p. 7).

Finally, it must be emphasized that in no event could this Commission issue an order which would impact interstate services. By definition, the Commission only regulates intrastate services, so the relief requested by the CLEC Coalition on this issue, and on every other issue under Section 13-801, is limited to intrastate services. Accordingly, the Commission must consider whether the different rules for intrastate services and interstate services that the CLEC Coalition proposes can rationally coexist. Under the CLEC Coalition's proposal, switching used for an interstate call would not have to be unbundled, but switching used for an interstate call would. Because the same switch port is used to switch intrastate and interstate calls, it is clear

that there cannot be inconsistent rules. The CLEC Coalition's proposal is fundamentally flawed and must be rejected[15].

### 3. CLECs Cannot Use ULS-ST To Provide IntraLATA Toll Transport To Other Toll Carriers

Section 13-801(d)(4) permits CLECs to use the UNE Platform only to provide services to the CLEC's own "end user or payphone service providers." (220 ILCS 5/13-801(d)(4)). If intraLATA toll traffic is routed across the LATA on the UNE Platform for the benefit of a third party IXC, the CLEC would not be using the UNE Platform to provide service to the end user. Rather, it would be using the UNE Platform to provide service to an IXC in plain violation of Section 13-801(d)(4). Moreover, as the FCC made clear in FCC Docket 96-98, Order Reconsideration, para. 13, (rel. Sept. 19, 1996), a CLEC that purchases unbundled local switching may not use it to provide interexchange services to users for whom the CLEC does not also provide local exchange service. The CLEC Coalition presents no new argument on this issue, and Ameritech Illinois stands on its Initial Brief which completely refutes the CLEC Coalition's position on this point. (Am. Ill. Init. Br., pp. 68-72).

### 4. Existing ULS-ST Reciprocal Compensation Arrangements Should Not Be Disturbed

The CLEC Coalition objects to pre-existing tariff language which establishes a symmetrical and reciprocal compensation rate for traffic terminating over ULS-ST provided by Ameritech Illinois. The rate is equal to the ULS-ST usage rate, and therefore

[15] Ameritech Illinois hastens to add that it is constrained from withdrawing unbundled local switching pursuant to certain requirements in the Ameritech Merger Order, as discussed in the initial brief. (Am. Ill. Init. Br., p. 76). Moreover, unbundled local switching is a 271 Checklist requirement. In the UNE Remand Order, the FCC noted that even if unbundled local switching is no longer required to be unbundled under Section 251(c)(3), checklist compliance could be established by continuing to provide that UNE pursuant to market-based prices, terms and conditions. Thus, Ameritech Illinois would meet its Section 271 Checklist obligation by making available unbundled local switching under the prevailing legal requirement at that time the application is filed with the FCC (either UNE-based or market-based prices, terms and conditions).

when the CLEC charges this rate on calls it terminates from Ameritech Illinois it fully recovers its cost of terminating the local call. Ameritech Illinois did not modify its tariff on this issue in this proceeding and nothing in Section 13-801 requires a change to the existing tariff. (Am. Ill. Init. Br., pp. 83-84).

### 5. The CLEC Coalition Misrepresents The Transiting Issue

CLEC Coalition represents this issue as follows:

> Clarifying that transiting -- i.e. the routing of ULS-originated calls to the customers of other interconnected carriers – is part of Shared Transport.

(Jt. CLEC Init. Br., p. 26). The issue does not involve whether transiting is part of Shared Transport -- it *is* part of Shared Transport and Ameritech Illinois' tariff is abundantly clear on this point. The real issue is whether Ameritech Illinois is required to assume financial responsibility for termination charges owed by CLECs to independent telecos, wireless providers and other CLECs. The CLEC Coalition has *deleted* the following *pre-existing and currently effective* language from Ameritech Illinois' tariff:

> The purchasing carrier is solely responsible for any terminating exchange access charges applicable to such intraLATA toll calls, including such charges that are payable to the Company and/or third party carriers for the termination of interLATA toll calls to their respective end users.

To the extent that the intent behind deleting this language is to require Ameritech Illinois to become responsible for the terminating charges levied by the third party carriers to the CLEC (either reciprocal compensation charges for local calls or switched access charges for toll calls), it is clearly wrong and must be rejected. Ameritech Illinois will provide transit transport to CLECs on Ameritech Illinois' network; there is absolutely no reason why it should be involved in any way in the third party termination charges incurred by CLECs.

## VII. THE CLEC COALITION'S LINE SPLITTING PROPOSALS SHOULD BE REJECTED

The CLEC Coalition (Jt. CLEC Init. Br., 15) repeats the argument of its witness, Mr. Gillan, that CLECs using the UNE-P to provide voice service "should be able to use Ameritech-supplied splitters to offer voice and data services, in competition with Ameritech." This argument flies in the face of the Commission's ruling in Docket No. 00-0393 that "Ameritech Illinois is not required to provide splitters under any circumstances and, therefore, cannot be required to provide them to CLECs utilizing the UNE-P." Amendatory Order, Docket No. 00-0393. For this reason and the other reasons discussed in the Company's Initial Brief (pp. 86-94), the CLEC Coalition's line splitting proposals should be rejected.

In support of its position, the CLEC Coalition relies on (i) Section 13-801(d)(4), which permits a CLEC to use a "network elements platform" to provide end-to-end services to end-users or payphone providers "without the requesting telecommunications carrier's provision or use of any other facilities or functionalities;" and (ii) Section 13-801(d)(6) which, inter alia, requires the requested network elements platform be provided without any "disruption to the end user's services." The CLEC Coalition reads far too much into these statutory provisions. Neither Section 13-801(d), nor any other provision of Section 13-801, even mentions the word "splitter," much less overturns the Commission's line splitting rulings in Docket 00-0393.

As previously discussed, because the term "platform" as used in Sections 13-801(d)(4) and (6) is not defined anywhere in the PUA, the term "platform" should be interpreted to have the same meaning as the term has consistently been defined by the FCC and this Commission, i.e., a contiguous assembly of an unbundled local loop and unbundled switch port with shared transport. (UNE Remand Order, ¶ 12; Line Sharing Order, n. 161; Texas 271 Order, ¶ 218; Order, Docket 95-0458, p. 58). A line sharing arrangement in which Ameritech Illinois is the voice provider and the data CLEC accesses the HFPL UNE, includes a splitter. A line sharing

arrangement does not constitute a "platform" for purposes of Section 13-801(d)(4) and Section 13-801(d)(6) and the migration "without interruption" requirement is not applicable in a line sharing scenario.

Moreover, even if the term "network elements platform" were construed to include combinations of UNEs other than a loop and a switch with shared transport (and the term should not be construed so broadly), Sections 13-801(d)(4) and (6) cannot and should not be construed to require Ameritech Illinois to provide CLECs with access to facilities, such as the splitter, which do not meet the criteria of an unbundled network element. First, because its splitter is not equipment used by Ameritech Illinois to provide a telecommunications service to its customers, it is not a "network element," as defined in Section 13-216 of the PUA. 220 ILCS 5/13-216. Rather, when a splitter is provided by Ameritech Illinois in a line sharing arrangement, it is done so for the convenience of a data CLEC to access the HFPL and provide service to its customers.

Second, even if a splitter is a "network element," it does not qualify for unbundling. Despite the CLEC Coalition's repeated insinuations, the Commission is not free to disregard the "necessary" and "impair" tests for the unbundling of network elements imposed by Section 251(d)(2) of the 1996 Act. To the contrary, the regulations promulgated by the FCC expressly require that state commissions apply the "necessary" and "impair" standards as set forth in FCC Rule 317 "when considering whether to require the unbundling of additional network elements." (47 CFR 51.317). As the United States Supreme Court has explained, federal regulations represent the actions of an administrator empowered by Congress to act on its behalf. Fidelity Federal Savings and Loan Assoc. v. De la Cuesta, 458 U.S. 141, 153-54 (1982). For this reason, FCC Rule 317 has "no less preemptive effect" than a direct mandate by Congress in the 1996 Act. (Id.). The CLEC Coalition's suggestion that Section 13-801 should be construed to

eliminate the need for the Commission to apply the "necessary" and "impair" test is, therefore, contrary to (i) the rule that a statute should not be construed in a manner which would render the statute unconstitutional and (ii) the General Assembly's intention, expressed in Section 13-801(a), that Section 13-801 should not be construed and applied in a manner which would be inconsistent with the 1996 Act or preempted by the FCC's orders.

The Commission has already determined that the splitter does not meet the "impair" test of FCC Rule 317 and Section 251(d)(2) of the 1996 Act, and that Ameritech Illinois cannot be required to provide splitters "under any circumstances" because CLECs can purchase splitters on their own from third party vendors just as easily as Ameritech Illinois can. (Amendatory Order, Docket No. 00-0393, p. 1). The CLEC Coalition cites no evidence (and none exists) to support a reversal of the Commission's conclusion. The undisputed evidence shows that unaffiliated CLECs are currently purchasing and installing their own splitters in their collocation cages, and providing splitter functionality themselves in ILEC central offices, proving that they are not "impaired" in their ability to provide this service. (Am. Ill. Ex. 4.1, p. 32).

Furthermore, even if Section 13-801 could be construed as requiring Ameritech Illinois to provide CLECs the use of Ameritech Illinois' own splitters (and it cannot be), that Section would only impact use of splitters in the provision of intrastate service. Splitters, however, are used to separate voice and data signals to accommodate the provision of DSL service over the high frequency portion of the loop. The predominant use of DSL is to provide access to the internet, and the FCC has ruled that the use of DSL to access the internet is always an interstate service. In the Matter of GTE Telephone Operating Cos., Memorandum of Opinion and Order, CC Docket No. 98-79, FCC 98-292 (rel. Oct. 20, 1998) ("ADSL Order"). Accordingly, the splitter is almost always used to provide an interstate service and, therefore, falls squarely within the scope

of the FCC's orders, which make it clear that ILECs have no obligation to provide CLECs with splitters.

## VIII. THE COMPANY'S COLLOCATION TARIFF, AS REVISED, COMPLIES WITH THE COLLOCATION REQUIREMENTS OF SECTION 13-801(c)

### A. THE TARIFF SHOULD CONTINUE TO INCLUDE THE "NECESSARY" STANDARD, AS APPROVED IN DOCKET 98-0615

Ameritech Illinois' currently effective Collocation Tariff, which was approved by the Commission in Docket 99-0615, provides, in part, as follows:

> Requesting carrier may collocate equipment necessary for interconnection with the Company as required by 47 USC § 251(c)(2) or access to the Company's unbundled network elements as required by 4 § 271(c)(3). Requesting carrier shall not collocate equipment that is not necessary for either such interconnection or such access.

(Ill.C.C. No. 20, Part 23, 4th Rev. Sheet, ¶ 10a.1). As discussed in the Company's Initial Brief (pp. 107-08), Ameritech Illinois has proposed to amend the Commission-approved language to comply with Section 13-801(c) by explicitly identifying specific types of equipment that may be collocated and to clearly provide for "physical and virtual collocation of any type of equipment necessary" for interconnection or access to unbundled network elements.

Staff recommends that the word "necessary" as used both in the currently effective tariff language approved by the Commission in Docket 99-0615, and in the modified version of that language proposed by Ameritech Illinois in this proceeding, should be removed. As the basis for this recommendation, Staff assumes that because the word "necessary" does not appear in Section 13-801(c), the General Assembly must have intended to adopt a collocation requirement which is "stricter" than that imposed by the 1996 Act, which limits the scope of the collocation requirement to "equipment necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6).

Contrary to Staff's assumption, however, there is nothing in Section 13-801(c) that precludes the continued use of the word "necessary" in Ameritech Illinois' collocation tariff. The statutory phrase relied on by Staff ("any type of equipment for interconnection or access to network elements . . .") does not prescribe the standard to be applied in determining whether particular equipment is "for" interconnection or network access. Staff is implicitly reading into the statute a "useful" standard, as in "any equipment useful for interconnection or access to network elements . . ." The General Assembly, however, did not include the words "useful," "necessary," or any other descriptor between "equipment" and "for" which would have ambiguously established a specific standard to be applied in implementing the collocation requirements of Section 13-801(c).

It is, therefore, the Commission's task to determine the appropriate standard. In doing so, the Commission should be guided by the well established rule that statutes should not be construed and applied in ways that render them invalid or that raise serious constitutional questions. E.g., Villegas v. Board of Fire & Police Comm'rs, 167 Ill.2d 108, 124 (1995). For the reasons discussed in the Company's Initial Brief (pp. 109-10), any application of Section 13-801(c) that imposes on Ameritech Illinois a requirement to provide for collocation of equipment that is not "necessary" for interconnection or access to UNEs would violate the plain language of the 1996 Act and thus be preempted under the Supremacy Clause of the United States Constitution (U.S. Const., Art. IV, cl. 2).

Staff (Init. Br., p. 31) cites Section 261(c) of the 1996 Act for the proposition that a state is permitted to impose obligations on an ILEC which are more stringent than those imposed under federal law so long as the state's requirements are not "inconsistent with the 1996 Act or the FCC's implementing regulations." According to Staff (Init. Br., p. 32), the adoption by a

state of a collocation requirement more stringent than the federal standard cannot be "inconsistent" with the 1996 Act if it "supports the federal scheme of promoting collocation." Staff's analysis is flawed because it erroneously assumes that any state requirement which "promotes collocation" is, by definition, compatible with the objectives of federal law. "Promoting collocation" is not the only objective of Section 251(c)(6). To the contrary, Congress included the word "necessary" in Section 251(c)(6) for the purpose of limiting the type of equipment that may be collocated. Congress did this to balance the need to "promote competition and innovation through the grant of collocation rights" with the need to "protect an incumbent LEC's property contests against unwarranted intrusion" and prevent an "unnecessary taking of private property." Deployment of Wireline Services Offering Advanced Telecommunications Capability, Fourth Report and Order, CC Docket No. 98-147, at ¶¶ 20-21 (rel. Aug. 8, 2001) ("Collocation Remand Order").

Where Congress has carefully balanced competing interests as part of a comprehensive statutory scheme, state laws or regulations that upset that balance are preempted. Edgar v. MITE Corp., 457 U.S. 624, 634 (1982) (provisions of Illinois Business Takeover Act preempted because they "upset the careful balance struck by Congress"); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212, n. 6 (1985) (preempting state laws that "upset the balance of power between labor and management expressed in our national labor policy") (internal quotation marks omitted). Imposition of a state requirement for collocation of equipment which is not necessary for interconnection or access to UNEs would upset the balance of public and private interests which Congress intended to strike by including the word "necessary" in Section 251(c)(6). Such a state requirement would, therefore, be preempted. This conclusion is supported by a recent decision of the federal district court in Wisconsin which overturned, as being inconsistent with

the 1996 Act, an Order of the Public Service Commission of Wisconsin purporting to rely on state authority to "go beyond" the 1996 Act and adopt an impermissibly lax interpretation of "necessary." Wisconsin Bell, Inc. v. Public Serv. Comm'n of Wisconsin, Opinion and Order, No. 98-C-0011-C, slip. op. at 21 (W.D. Wisc. Oct. 17, 2001).

Furthermore, Staff fails to cite any evidence (and none exists) to support its claim that a "stricter" collocation standard would promote competition. In fact, removal of the "necessary" standard would inhibit the development of competition because it would allow CLECs to provide for arbitrary and indiscriminate placement within Ameritech Illinois' central offices of structures and/or equipment which are not necessary for interconnection or access to UNEs, thereby reducing the amount of available space in Ameritech Illinois' central offices for to place equipment for which collocation is necessary.[16]

As Staff correctly notes, Section 13-801(a) states as follows:

> Section 13-801(a) provides additional State requirements contemplated by, but not inconsistent with, Section 261(c) of the federal Telecommunications Act of 1996, and not preempted by orders of the Federal Communications Commission.

220 ILCS 5/13-801(a). Relying on this language of Staff (Init. Br., p. 33) asserts that the "legislature did not require that the provisions of Section 13-801 be analyzed by the Commission to determine whether this legislation was consistent with the federal act – rather, the legislature specifically and unambiguously stated their view that Section 13-801 was not inconsistent with TA96 and its regulations." Accordingly, Staff (Init. Br., pp. 33-34) suggests that the Commission "has no alternative" but to adopt Staff's interpretation of Section 13-801(c) as

[16] For example, the FCC has specifically found that traditional circuit switches generally do not need the "necessary" standard. Collocation Remand Order, ¶ 48. If removal of the "necessary" standard from the Company's collocation tariff were construed to allow for the collocation of traditional circuit switching equipment, such as a traditional 5ESS circuit switch, it could quickly result in the exhaustion of collocation space within Ameritech Illinois' central offices.

prohibiting the Commission from permitting the inclusion of the word "necessary" in Ameritech Illinois' collocation tariff.

Staff's analysis is circular because it simply assumes that the General Assembly "unambiguously" intended to impose a collocation standard stricter than the federal standard. Similar to other provisions of the PUA, however, Section 13-801(c) establishes guidelines for, but does not specify all of the terms and condition of applicable to, the provision of a particular service. In particular, as previously discussed, the statute is silent as to standard ("necessary" or "useful") which should be applied in determining the types of equipment for which collocation is required. In Ameritech Illinois' view, the purpose of Section 13-801(a) is to express the General Assembly's desire that the requirements of Section 13-801 be interpreted and applied by the Commission in a manner which will not result in the preemption of those requirements. Staff's argument, however, suggests that the Commission should go out of its way to interpret and apply Section 13-801(c) in a manner which is inconsistent with federal law, thereby putting the statute on a collision course with the Supremacy Clause. Staff's approach is directly contrary to the rule that statutes not be construed in ways that render them invalid or that raise serious constitutional concerns.[17]

Staff (Init. Br., p. 34) also argues that the word "necessary" should be eliminated from the Company's collocation tariff because "the definition of this standard has been the subject of much controversy at the federal level and Ameritech's application of it would undoubtedly lead to disputes." What Staff fails to mention is that the FCC, in the Collocation Remand Order,

[17] Contrary to Staff's suggestion (Init. Br., p. 33), the general reference in Section 13-801(a) to "requirement or obligations stringent than those obligations" imposed by the 1996 Act does not mandate the adoption of Staff's interpretation of Section 13-801(c). Rather, the language refers to provisions of Section 13-801, such as the UNE provisioning intervals specified in Section 13-801(d)(5) and the UNE-P platform terms and conditions in Section 13-801(d)(6), which "exceed" the requirements of, but are not inconsistent with, the 1996 Act.

resolved the "controversy at the federal level." Specifically, the FCC concluded, based on its analysis of "broader statutory scheme and underlying policy goals," as follows:

> We now conclude that equipment is "unnecessary" for interconnection or access to unbundled network elements within the meaning of Section 251(c)(6) if an inability to deploy that equipment would, as a practical, economics, or operational matter preclude the requesting carrier from obtaining interconnection or access to unbundled network elements.

Collocation Remand Order, ¶ 21. In support of this interpretation, the FCC concluded that Congress used the term "necessary" to balance two competing interests: (i) the promotion of competition through the grant of collocation rights and (ii) protection of the "incumbent LEC's legitimate property interests against unwarranted intrusion." (Collocation Remand Order, ¶ 20). Staff's understandable desire to minimize the potential for CLEC-initiated litigation does not lawfully justify a decision by the Commission to interpret and apply Section 13-801(c) in a manner which would eviscerate Ameritech Illinois' property rights and upset the balance of public and private interests which underlies Congress' use of the word "necessary."

### B. STAFF'S PROPOSED LANGUAGE REGARDING MULTIFUNCTIONAL EQUIPMENT SHOULD BE REVISED

Staff, for the first time, proposes to add specific language to the Company's proposed tariff for the purpose of clarifying that collocation should be required for "multifunctional equipment only if the primary purpose and function of the equipment, as the requesting carrier seeks to deploy it, are to provide the requesting carrier with 'equal in quality' interconnection or 'nondiscriminatory access' to one or more unbundled network elements." (Staff Init. Br., Attach., Ill.C.C. No. 20, Part 23, Section 4, Rev. Sheet No. 1.2). As the Company noted in its Initial Brief, Section 13-801(c) does not refer to "multifunctional equipment." Moreover, because Ameritech Illinois' collocation tariff incorporates the FCC's "necessary" standard it can, and should, be interpreted as allowing for collocation of "multifunctional" equipment in

accordance with the FCC's policy, as set forth in the Collocation Remand Order (¶¶ 32-43, 53). Accordingly, there is not need to adopt Staff's proposed language.

In the event that the Commission deems it appropriate to include language in the tariff expressly dealing with "multifunctional" equipment, Staff's proposed language should be modified to more closely track the conditions for the collocation of multifunctional equipment adopted by the FCC in its Collocation Remand Order (¶¶ 36, 53), as follows:

> . . . and multifunctional equipment only if the primary purpose and function of the equipment, as the requesting carrier seeks to deploy it, are to provide the requesting carrier with 'equal in quality' interconnection or 'nondiscriminatory access' to one or more unbundled network elements while ensuring that multifunction equipment places no greater relative burden on the incumbent's property than comparable single-function equipment.

## IX. THE COMPANY'S TARIFF COMPLIES WITH THE STATUTORY REQUIREMENTS FOR CROSS-CONNECTS

### A. RESPONSE TO STAFF

As discussed in the Company's Initial Brief (p. 114), Ameritech Illinois allows for direct cross-connections between the facilities of carriers under the "Carrier Cross-Connect Service for Interconnection" ("CCCSI"), the terms and condition of which are contained in Paragraph 5 of Sheet No. 11 of the Company's Collocation Tariff (Ill.C.C. 20, Part 23, Section 4). The Collocation Tariff, including Paragraph 5, was approved by the Commission in its Order dated August 15, 2000 in Docket 99-0615, and is currently in effect. (Am. Ill. Ex. 5.0, p. 5; Am. Ill. Ex. 5.1, p. 9; Am. Ill. Ex. 1.0, Attach. 1.2, p. 85). In accordance with Section 13-801(c), the Company has added language to Paragraph 5 to make it clear that direct cross-connections between collocated carriers will be provided "using the most reasonably direct and efficient connections that that are consistent with safety and network reliability standards."

Staff (Init. Br., p. 41) argues that the "additional limitations which Ameritech proposes to include in its tariff relating to technical engineering requirements be eliminated." Staff is referring to language in Paragraph 5 which provides that, if a Requesting Carrier provides CCCSI, such CCCSI must "comply in all respects with the Company's technical and engineering requirements." Contrary to Staff's suggestion, this is not an "additional limitation" which the Company is "proposing to include in its tariff." To the contrary, it is a reasonable work standard already included in the tariff language approved by the Commission in Docket 99-0615.

In this regard, Staff continues to confuse the standard applicable to the cross connect service being offered and the safety and security procedures that must be followed by Ameritech Illinois and its vendors, as well as the CLECs and their vendors, when working in Ameritech Illinois offices. Ameritech Illinois' proposed tariff complies with Section 13-801(c), as it provides that cross connects should be provided "using the most reasonably direct and efficient connections that are consistent with safety and network reliability standards." As discussed by Ameritech Illinois witness Bates, however, the "safety and network reliability" standard in Section 13-801(c) does not eliminate the need for other reasonable collocation rules and requirements, such as the work place safety practices. (Am. Ill. Ex. 5.1, pp. 11-12). Ameritech Illinois provides voluminous documentation as to such technical and engineering standards on the publicly available CLEC website, in the Collocation Services Handbook, Collocation website technical and engineering standards TP 76300MP and TP76200MP. These standards, which are equally applicable to Ameritech Illinois, CLECs and their respective vendors, prevent (i) placing too much cable or weight in the overhead racking; (ii) placing "live" wires overhead in racking; and (iii) improperly securing of cables (tying-down cable) to prevent wire chafing which can led to central office fires.

To make it crystal clear that the technical and engineering requirements are not burdens being uniquely placed on CLECs, Ameritech Illinois would accept clarifying language, as follows:

> Whether Ameritech Illinois, Ameritech Illinois' approved vendor, CLEC (Requesting Carrier), Requesting Carrier's approved vendor provides CCCSI, such CCCSI (i) must, at a minimum, comply in all respects with the Company's technical and engineering requirements . . .

Staff argues that "this Commission always has the authority to amend tariffs." This proceeding, however, was not initiated for the purpose of performing a general review of the Company's collocation tariff. Rather, the purpose of the proceeding is to determine whether Ameritech Illinois' wholesale tariff, as revised, complies with the requirements of Section 13-801. Staff fails to explain how the "new legislation" supports its proposal to revise the tariff approved in Docket 99-0615. Section 13-801(c) does not purport to set forth in detail all of the terms and conditions which must be included in a tariff governing cross-connects between collocated carriers. There is nothing in Section 13-801(c) which suggests that the tariff language regarding "technical and engineering requirements" approved 18 months ago should be "reevaluated." To the contrary, as the Company pointed out in its Initial Brief (p. 115), the requirement that requesting carriers, or their third party vendors, comply with the Company's technical and engineering requirements when performing work to install a direct cross-connect is essential to meeting Section 13-801(c)'s requirement that direct connections be accomplished "consistent with safety and reliability standards."

Staff (Init. Br., p. 48) has withdrawn its proposal to remove from Paragraph 5 the approved language which provides that, if a Requesting Carrier provides CCCSI, the Carrier shall be required to "lease the Company's cable rack and/or riser space to carry the connecting transport facility." Staff, however, states that it "reserves its right to object to the charges

relating to the leasing of cable racks and/or risers in Phase II of this proceeding." It is the Company's understanding that the purpose of Phase II is to determine what rate elements should properly apply to certain UNE combinations. As Paragraph 5 states, the rates for the leasing of cable racks and riser space are set forth in Part D of the terms and conditions for Ameritech Illinois' Physical Collocation Offerings (Ill.C.C. No. 20, Part 23, Section 4, 1st Rev. Sheet Nos. 33, 36). The cable rack lease rates were approved in Docket 99-0615. The riser space lease rates were approved in the recently completed TELRIC Compliance proceeding, Docket 98-0396. A reevaluation of those rates at this time is unnecessary and outside the scope of this docket.

**B. RESPONSE TO SPRINT**

Sprint argues that Paragraph 5 should be deleted in its entirety and replaced with language proposed by the CLEC Coalition which simply quotes verbatim that portion of Section 13-801(c) which governs cross-connects. The statutory language, however, describes the Company's cross-connect obligations in very general terms and is no substitute for the previously approved tariff language which spells out the specific terms and conditions applicable to the Company's direct cross-connect services.

In support of its proposal, Sprint (Sprint Init. Br., p. 8) argues that the language of Paragraph 5 "only contemplates connections between collocated carriers not providing for a connection between a collocated carrier and non-collocated carrier." Sprint's argument misses the mark. While Paragraph 5 does, in fact, deal with direct connections between collocated carriers, other provisions of the Company's proposed tariffs address the statutory requirements related to cross-connections between the UNE Platform or transport facilities of a non-collocated carrier and the facilities of a collocated carrier. These tariff provisions are discussed in Ameritech Illinois' Initial Brief (pp. 115-16).

## X. THE COMPANY'S PROPOSED TARIFFS COMPLY WITH THE PROVISIONS OF SECTION 13-801(d)(5) RELATED TO PROVISIONING INTERVALS FOR LOOPS AND HFPL

### A. THE CLEC COALITION HAS PRESENTED NO SUPPORT FOR ITS PROPOSAL TO DELETE TARIFF LANGUAGE REGARDING THE "LINE SHARE TURN UP TEST" PROCEDURE

As explained in Ameritech Illinois' Initial Brief (pp. 94-95), the tariff sheets proposed by the Company contain language indicating that provisioning intervals applicable to the high frequency portion of the loop ("HFPL") "will be considered tolled pursuant to the process outlined in the Line Share Turn Up Test." (Am. Ill. Ex. 1.0, Attach. 1.1, p. 10; Ill.C.C. No. 20, Part 19, Section 2, 4th Rev. Sheet No. 16). Staff's proposed tariffs also include this language. For the reasons fully discussed in the Company's Initial Brief (pp. 95-98), this language is supported by its evidence, consistent with Section 13-801(d)(3) and should be approved.

The CLEC Coalition has deleted the tolling language from the proposed tariff attached to its Initial Brief. The CLEC Coalition, however, offered no explanation for this deletion. Furthermore, no party presented any testimony rebutting the evidence presented by the Company in support of the tolling provision. Accordingly, the CLEC Coalition's proposal to delete the tolling language must be rejected.

### B. A 24 HOUR PROVISIONING INTERVAL FOR HFPL DOES NOT, AND SHOULD NOT, APPLY WHERE CONDITIONING IS REQUESTED

Staff supports the CLEC Coalition's proposal to eliminate from the Company's currently effective tariff language indicating that the 24 hour provisioning interval for HFPL applies only "where no conditioning is requested."[18] In support of its position, Staff states that "Section 13-801(d)(5) contains no language regarding consideration of loop conditioning . . ." (Staff Init. Br., p. 76). This assertion is incorrect. Section 13-801(d)(5) expressly authorizes an interval of

[18] The CLEC Coalition Brief does not contain any arguments in support of this proposal.

"ten business days for the conditioning of unbundled loops." For the reasons explained by the Company in its Initial Brief (pp. 98-99), there is no reason not to apply this language to the provisioning of the high frequency portion of loop.

Staff's position is also directly inconsistent with its endorsement of Sprint witness Maples' testimony that "the tariff language [should] reflect previous Commission decisions on the provisioning intervals for HFPL." (Staff Init. Br., p. 76; Sprint Ex. 1.0, p. 5). As Mr. Maples testified, and as Staff expressly recognizes (Staff Init. Br., p. 76-77, fn. 30), the Commission, in Docket Nos. 00-0312/0313 (Consol.) and 00-0393 approved a one-day interval for provisioning of HFPL without conditioning and a three-day interval for the provisioning of HFPL requiring conditioning.

Staff further argues that "Ameritech Illinois failed, in the proceeding, to establish that [conditioning] should be taken into account for the provisioning intervals of HFPL . . ." (Staff Init. Br., p. 76). Staff ignores the extensive, and unrefuted, evidence presented by Ameritech Illinois witness Welch in which he detailed the process and extensive work activities needed to condition a loop for a CLEC to use the HFPL. (Am. Init. Br., pp. 100-01, Attach. 2; Am. Ill. Ex. 4.1, pp. 17-25). For the reasons discussed by Mr. Welch, loop conditioning is a long and tedious process which, depending on the number of locations involved, site conditions and weather conditions, can sometimes require ten days or longer to complete. (Am. Ill. Ex. 4.1, pp. 22-23). The evidence presented by Mr. Welch demonstrates that the interval for the provisioning of HFPL which requires conditioning should be increased from three days to ten days -- the interval authorized in Section 13-801(d)(5).

Accordingly, the Commission should reject Staff's proposal. Instead, the Commission should authorize Ameritech Illinois to revise its tariff to include a ten day provisioning interval for all loops, including those used for provisioning HFPL orders where conditioning is requested.

### C. THE EXISTING TARIFF LANGUAGE REGARDING ORDERS OF ONE TO TWENTY LOOPS PER ORDER OR USER LOCATION SHOULD NOT BE ELIMINATED

The Company's currently effective tariff, which was filed in compliance with the Order in Docket 00-0393, provides that the 24 hour interval for HFPL without conditioning applies to orders of 1 to 20 loops per order or end user location. Staff and Sprint argue that the Company should be required to meet orders for HFPL provisioning within 24 hours without regard to the number of loops per order and end user location. (Staff Init. Br., pp. 75-77; Sprint Init. Br., pp. 3-5).

In support of their position, Staff and Sprint both rely on the Order issued in Docket 00-0393. As Sprint correctly notes, that Order does not expressly adopt a 20 loop per order maximum with respect to the 24 hour provisioning interval adopted in that case. The Commission's findings in Docket 00-0393 do not, however, expressly address the provisioning intervals for orders of more than 20 loops. (Am. Ill. Ex. 4.0, p. 7). Thus, the Commission did not unambiguously reject the Company's position that the 24 hour provisioning interval should not apply to orders with more than 20 loops.

Assuming that the Commission interprets its order in Docket 00-0393 as imposing a 24 hour provisioning interval without regard to the number of loops ordered, Ameritech Illinois believes that the Commission has authority under Section 13-801(d)(5), and should exercise that authority in this case, to approve a 20 loop maximum. Contrary to Staff's assertion (Staff Init. Br., p. 76, fn. 29), the Company did present evidence supporting its position in this regard. As discussed by Mr. Welch, given the steps that must be taken to provision an HFPL order (Am. Ill.

Ex. 4.1, pp. 4-5), it is unreasonable to expect that Ameritech Illinois' central office personnel, especially those personnel in central offices that are rarely staffed, can provision an unlimited number of HFPL loops at any given time. (Am. Ill. Ex. 4.1, p. 7). Moreover, as Mr. Welch also explained, in situations where line and station transfers are required to complete an HFPL order, the difficulty of meeting a 24 hour provisioning interval is significantly increased, especially when multiple loops must be provisioned on a single order or end user location. (Am. Ill. Ex. 4.1, pp. 8-9). Accordingly, it is appropriate to recognize longer time intervals for the provisioning of HFPL orders which exceed 20 loops per order or end user location.

### D. UNE LOOP PROVISIONING INTERVALS

In its brief (p. 82), Staff proposes the adoption of tariff language suggested by the CLEC Coalition, which states as follows:

> The service installation interval for each specific UNE loop shall be provided consistent with Section 13-801(d)(5) of the PUA or existing Commission orders. Where intervals are not defined, installation will be provided at parity with the comparable retail service of the Company or any affiliate.

By endorsing this language, Staff appears to recognize that intervals for loops different than the five day interval expressly identified in Section 13-801(d)(5) are allowed under the "unless or until" clause of that Section if those intervals have previously been established by rule or order of the Commission. As the Company explained in its Initial Brief (pp. 104-106), Ameritech Illinois' provisioning business rules contain intervals of 3 days for 1 to 10 loops, 7 days for 11 to 20 loops, and 10 days for more than 20 loops. Those intervals were established in accordance with the requirements of Condition 30 of the Commission's order approving the SBC/Ameritech merger in Docket 98-0555 (the "Merger Order"). Accordingly, the standard intervals are "consistent" with an "existing Commission order." The use of those standard intervals has been

reaffirmed through the collaborative process initiated pursuant to Condition 30 of the Merger Order.

In its brief (Staff Init. Br., pp. 82-83), Staff refers to Ameritech Illinois tariff ICC No. 20, Part 19, Section 1, Original Sheet No. 4.2. This tariff sheet sets forth standard intervals for the provisioning of loops which are not consistent with those included in the Company's business rules pursuant to Merger Condition 30. Accordingly, Ameritech Illinois agrees that the tariff sheet referred to by Staff should be revised in light of the currently applicable provisioning intervals referenced above. As discussed in the Company's Initial Brief (p. 106), the Company plans to file tariff sheets to reflect the results of the most recently completed six month performance measure review. At that time, the Company will include a correction to its current tariff sheet setting forth business rules of Performance Measure 56 ("PM 56") to clearly set forth the standard 3, 7, and 10 day intervals for loop provisioning. (Am. Ill. Ex. 10.0, p. 7). The Company anticipates that it will file those tariff sheets on or before February 15, 2002.

Staff states that "while the intervals may have been agreed to by the parties in a collaborative process, the measure itself should remain parity based." (Staff Init. Br., p. 81). As the Company explained in its Initial Brief, PM 56 is a parity based performance measure. Specifically, PM 56 measures the percentage of time that UNE loops provisioned within "X" days, with "X" being the standard interval for UNE loops. The parity comparison is to the percentage of time that the corresponding retail product is provisioned within "Y" days, with "Y" being the standard interval for the retail product. The standard intervals for UNE loops documented in the business rules for PM 56 are an integral part of the performance measure calculations and Ameritech Illinois' business for provisioning of UNE loops. (Am. Ill. Ex. 10.0, pp. 6-7).

In the tariff sheets attached to its Initial Brief, Staff includes proposed language that is different than the CLEC proposed tariff language espoused by Staff in the body of its brief. Specifically, Staff has included language on 1st Revised Sheet No. 4.2 of Section 1 of Part 19 which states, in part, that the "service installation interval for each specific UNE loop shall be consistent with Section 13-801(d)(5) of the Illinois PUA or Commission orders dated after July 1, 2001" (emphasis added). Thus, Staff has replaced the term "existing orders" with the term "orders dated after July 1, 2001." This unexplained change to the CLEC Coalition's proposed tariff language is unsupported by the testimony of any witness and is contrary to the testimony of Staff witness McClerren and the argument made by Staff in its brief. Accordingly, the revision to Original Sheet No. 4.2 proposed by Staff should be rejected.[19]

## XI. AMERITECH ILLINOIS' SPOI PROPOSAL IS JUST AND REASONABLE

Ameritech Illinois' SPOI proposal is inherently fair because it asks the CLEC to pay some, but not all, the added costs Ameritech Illinois incurs when a CLEC decides to use a single point of interconnection. It also preserves the CLEC's economic incentive for efficient network investment and design. The other proposals are inherently inequitable because they force Ameritech Illinois to bear all of the additional expense which arises from a single point of interconnection architecture. Nothing in Section 13-801 or federal precedent requires Ameritech Illinois to bear these costs. To the contrary, Section 13-801(b)(1)(B) and 13-801(g) contemplate that Ameritech Illinois will be permitted to recover its cost-based rates of providing interconnection via a SPOI architecture, as does Section 1-102, which declares that an objective

[19] Staff (Init. Br., pp. 79-80) also proposes to add tariff language which mirrors the statutory provisions of Section 13-801(d)(5) to the effect that (i) the Commission can approve an interval which is shorter than the interval for the comparable retail service if the CLEC meets the burden of proving that it performs other functions or activities after receipt of the network element and (ii) the Commission shall exclude performance that is adversely affected by occurrences beyond the ILEC's control in measuring compliance with the required provisioning intervals. For the reasons discussed in the Company's Initial Brief (p. 74), it is unnecessary to replicate all statutory language in a tariff.

of the PUA is to make sure that costs are "allocated to those who cause the costs to be incurred." 220 ILCS 5/1-102(d)(iii). Equally important, the FCC has found on more than one occasion that an ILEC complies with the SPOI requirement even when CLECs are charged for the additional transport caused by the SPOI architecture.

The Kansas/Oklahoma 271 Order[20] supports Ameritech Illinois' position. In that proceeding, commenters argued that SWBT effectively denied a competing carrier the right to select a single point of interconnection by "improperly" shifting to competing carriers the transport and switching costs associated with such an arrangement. Kansas/Oklahoma 271 Order, at para. 233. The FCC declined to invalidate the SWBT SPOI process on that basis. Thus, contrary to Staff's argument, the outcome of the Kansas/Oklahoma 271 proceeding does not establish any rule that would prohibit Ameritech Illinois from charging CLECs for local traffic that originates on its network.

This was confirmed in a later proceeding before the FCC, this time involving Verizon's Pennsylvania 271[21] application. In that proceeding, once again, CLECs argued that Verizon denied CLECs the ability to use the SPOI architecture because of additional transport charges that apply between the SPOI and the Verizon end office or tandem. The FCC *rejected* the CLECs arguments and specifically found that "Verizon's policies do not represent a violation of our existing rules." Pennsylvania 271 Order, at para. 100.

Focal complains that Ameritech Illinois' SPOI proposal changes the interconnection obligations which exist today. This criticism is baseless for two reasons. First, there is no

[20] In re Joint Application by SBC Communications, Inc. et al for Provision of In-Region, interLATA Services in Kansas and Oklahoma, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29 (rel. Jan 22, 2001) ("Kansas/Oklahoma 271 Order").

[21] In re Application of Verizon Pennsylvania Inc. et al. for Authorization to provide In-Region, interLATA Services In Pennsylvania, CC Docket No. 01-0138, Memorandum Opinion and Order, FCC 10-269 (rel. Sept. 19, 2001) ("Pennsylvania 271 Order").

change in interconnection obligations for CLECs who, like Focal, have established multiple POIs which interconnect with each tandem in the LATA. (Focal Ex. 2.0, p. 9). Second, for those CLECs that take advantage of the SPOI architecture, there is clearly – and necessarily – a change in the interconnection arrangement. This is because the SPOI interconnection architecture is new as a matter of Illinois law and should carry with it the financial obligations Ameritech Illinois proposes.

Focal and Staff continue to misinterpret Ameritech Illinois' proposal as requiring CLECs to pay for dedicated trunks from the SPOI to Ameritech Illinois' tandems or end offices (the so-called "virtual" POI). It does not. Ameritech Illinois is willing to provide that transport on a "pay as you go", minute of use basis. There is, therefore, nothing to the assertion that CLECs would be required to establish "virtual" POIs.

Three other issues raised by Focal require clarification. First, there will be no "double recovery" by Ameritech Illinois. The transport charges under the SPOI proposal apply only from the SPOI to the first point of switching on the Ameritech Illinois network (either a tandem or end office). Reciprocal compensation charges, on the other hand, pick-up where the SPOI transport charges leave off. Specifically, they apply to the transport provided from the tandem to the called party. (There is no transport-related component to a reciprocal compensation charge when traffic is handed off to Ameritech Illinois at the end office).

Second, Ameritech Illinois' proposal does <u>not</u> apply to toll calls. When Ameritech Illinois terminates a toll call it imposes access charges and those access charges have a built-in transport component. Accordingly, no *additional* transport charge would be required to fairly apportion costs between Ameritech Illinois and the CLEC. Ameritech Illinois' proposal relates only to local and FX traffic.

Third, as a matter of clarification, Ameritech Illinois will not impose any switching charges under its SPOI proposal. While it is theoretically possible for these types of charges to apply, Ameritech Illinois will confine its proposal to the recovery of transport.

As a final matter, Ameritech Illinois' language regarding a "mutually agreed" SPOI location does not deprive CLECs of any rights under the statute. As explained in its initial brief, Ameritech Illinois has modified its language to acknowledge that mutual agreement is a desired, but not a required, outcome. If a CLEC wishes to designate a point of interconnection that is not acceptable to Ameritech Illinois (and Ameritech Illinois acknowledges it is obligated to agree to interconnection at any technical feasible point) then the CLEC can nonetheless designate the point of interconnection, while reimbursing Ameritech Illinois for certain costs. Thus, Ameritech Illinois' proposal preserves both interests. Ameritech Illinois can use its best efforts to seek mutual agreement, but the CLEC always has the option to designate the POI regardless of whether or not Ameritech Illinois agrees.

## XII. THE COMMISSION SHOULD ADOPT AMERITECH ILLINOIS' BFR PROPOSAL AND REJECT THE CLEC COALITION'S "RAC" PROPOSAL

Nowhere in the annals of Illinois regulation is there a mechanism as gratuitously punitive as the CLEC's RAC proposal. The RAC proposal is not authorized by Section 13-801 and is not needed to implement the requirements of Section 13-801. It has unrealistically short deadlines that cannot be met, it imposes vague and ambiguous requirements regarding the information the Ameritech Illinois must provide, and, to top it all off, it provides that Ameritech Illinois' failure to scrupulously comply is a "per se" violation of Section 13-514 of the PUA. This, in turn, exposes Ameritech Illinois to hundreds of thousands of dollars in penalties. There is nothing fair or equitable about this mechanism. It is designed to ensure failure and to permit

CLECs to argue that Ameritech Illinois has not met its obligations. It would be difficult to imagine a proposal more pernicious than this.

The RAC process creates a solution for a problem that does not even exist. It is premised on the mere allegation that Ameritech Illinois will not comply with its obligations under Section 13-801 and that CLECs will be unable to obtain new "ordinarily combined" unbundled network elements in a meaningful way. This is unsupported speculation about what may happen in the future. Rather than hastily imposing a solution in search of a problem, the Commission should wait to see how this issue develops and should consider specific proposals regarding a mechanism if and only if: 1) existing enforcement mechanisms in the PUA are insufficient to vindicate the CLECs rights with respect to "ordinarily combined" UNEs; and 2) actual experience in the industry shows that additional Commission action is required.

Ameritech Illinois will not repeat its discussion of each defect in the RAC proposal, (Am. Ill. Init. Br., pp. 118-130), other than to say that there is not one shred of evidence in the record which would support a finding that the intervals in the RAC process can be met. The CLEC Coalition has studiously avoided any consideration of Ameritech Illinois' evidence which establishes that these intervals are unrealistic.

Ameritech Illinois is not suggesting that CLECs have no avenue to obtain new "ordinarily combined" UNEs. To the contrary, from the outset of this proceeding Ameritech Illinois has proposed the BFR process as most efficient means to obtain these new UNE combinations. Indeed, Ameritech Illinois' BFR-OC process fulfills the three main criteria established by the CLEC Coalition itself: 1) it establishes a process for requesting and providing new "ordinarily combined" UNEs; 2) it is expedited; and 3) the fee to initiate the process has been eliminated. In particular, Ameritech Illinois has explained that it has developed an

accelerated BFR-OC process that has reduced by twenty-five percent (30 days) the time required for the BFR-OC process. In addition, CLECs will know within ten (10) days whether Ameritech Illinois will reject the request on the grounds that the requested UNEs are not "ordinarily combined" by Ameritech Illinois. This early notification will allow the CLEC to quickly dispute any Ameritech Illinois determination with which it may disagree. Finally, Ameritech Illinois will waive its standard $2,000 fee associated with a BFR request, provided that such waiver addresses the Commission's concerns associated with that charge. In short, the BFR-OC process effectively accommodates requests for new "ordinarily combined" unbundled network elements and should be adopted by the Commission.

## XIII. AMERITECH ILLINOIS' SCHEDULE OF RATES PROPOSAL PROPERLY IMPLEMENTS SECTION 13-801(i)

Section 13-801(i) requires Ameritech Illinois to provide a Schedule of Rates in response to "a proposed order" identified by the requesting CLEC. The purpose of this provision is to assist CLECs in interpreting the pricing provisions of the applicable tariff or interconnection agreement for existing services offered by Ameritech Illinois to CLECs. Ameritech Illinois' proposal scrupulously implements this requirement by creating a process for Schedule of Rate requests. (Am. Ill. Init. Br. pp. 147-49). With the exception of two minor points, the CLEC Coalition agrees.

Staff's Schedule of Rates proposal perverts this straight forward application of Section 13-801(i). Under Staff's proposal, Section 13-801(i) would be used not as a mechanism to obtain prompt price quotations. Rather, by Staff's own admission, it would be used as a device to implement Section 13-801(d)(3) by allowing CLECs to request new UNEs and by requiring Ameritech Illinois to identify ordinarily combined UNEs that exist within Ameritech Illinois' retail services. This is an improper use of Section 13-801(i). Staff should not be permitted to

cavalierly ignore the clear purpose of that section in order to achieve an end that is nowhere authorized in the statute (i.e., the requirement that Ameritech Illinois identify ordinarily combined UNEs based on retail services[22]).

Staff's improper use of Section 13-801(i) is best illustrated by the two-day time limit built into that section. Under Section 13-801(i), Ameritech Illinois is required to deliver the requested Schedule of Rates within two business days for 95% of the requests for each requesting carrier. The short time limit obviously contemplates that Ameritech Illinois will be performing an essentially clerical task in retrieving rates from the applicable tariff or interconnection agreement. Under Staff's proposal, however, Ameritech Illinois has the same two day interval to undertake a complex analysis which includes: 1) identifying all unbundled network elements contained within a retail service; 2) determining which of those network elements, if any, are "unbundled" network elements; and 3) determining whether any sequence of the unbundled network elements are "ordinarily combined" by Ameritech Illinois within the meaning of Section 13-801(d)(3). Obviously, this is far more than a ministerial function which could be accomplished within two days because it would require close collaboration between Ameritech Illinois' network, regulatory, wholesale, and legal organizations. In addition, this is not an analysis which Ameritech Illinois could undertake lightly, inasmuch as Sections 13-514 through 13-516 create severe penalties for noncompliance with the requirements of Section 13-801. Staff's improper use of Section 13-801 would, therefore, have consequences far beyond those which have been contemplated and would place Ameritech Illinois in serious jeopardy in a way never intended by the legislature.

[22] Ameritech Illinois objects to Staff's language in the Schedule of Rates section of its proposed tariff (Ill. C.C. No. 20, Part 19, Section 1, Sheet No. 3.1) as well as the last paragraph in the EEL tariff, which also would authorize a request for a Schedule of Rates under Section 13-801(i).

Staff's error is compounded because there is no need to use Section 13-801(i) in this way. Ameritech Illinois' BFR-OC process is prompt and cost-effective and provides a fair and effective mechanism to accommodate requests for new ordinarily combined UNEs.

Staff's proposal is flawed in one other important respect. It is based on the mistaken assumption that every Ameritech Illinois retail service has an ordinarily combined UNE within it and that every Ameritech Illinois retail service can be offered by a CLEC using the alleged ordinarily combined UNE. Both assumptions are wrong. (Am. Ill. Init. Br., p. 126).

Finally, Staff makes a curious argument that its proposal "benefits" Ameritech Illinois because it does not require Ameritech Illinois to identify all combinations of UNEs used to provide a retail service. Staff would permit Ameritech Illinois to identify the "most common configuration of UNEs ordinarily combined to provide that service." (Staff Init. Br., p. 90). It is difficult to see how this proposal "benefits" Ameritech Illinois, particularly when it is based on an improper application of section 13-801(i) in the first place. To say that Ameritech Illinois "benefits" because Staff could have advocated a far more punitive proposal it is like the government telling tax payers that they "benefit" from a small tax increase because, after all, the increase could have been much larger. There is no "benefit" for Ameritech Illinois in Staff's proposal and there is no basis under Section 13-801(i) to impose the obligation[23].

## XIV. AFFILIATES OF AMERITECH ILLINOIS ARE NOT SUBJECT TO SECTION 13-801

As Ameritech Illinois demonstrated in its Initial Brief, (Am. Ill. Init. Br., pp. 131-34), Section 13-801 creates no new obligations on Ameritech Illinois as a result of its relationship

[23] In its Initial Brief Staff agrees to drop the "affiliate" language from tariff language relating to the "ordinarily combined" requirement. (Staff Init. Brief, pp. 53, n. 17 and p. 59, n. 22). Staff presumably intended to delete the words "or Company affiliates" from paragraph 3.b of its Schedule of Rates proposal, (Ill. C.C. No. 20, Part 19, Section 1, Sheet No. 3.1), since that proposal also relates to the 'ordinarily combines" standard of 801(d)(3).

with affiliates such as AADS. The statute provides that the "incumbent local exchange carrier shall combine any sequence of unbundled network elements that it ordinarily combines for itself" (emphasis added). 220 ILCS 5/13-801(d)(3). Section 13-801, in its entirety, creates new obligations only for carriers subject to alternative regulation, and Ameritech Illinois is the only such carrier in the state. It makes little difference that the term "incumbent local exchange carrier" is elsewhere defined to include "successors, assigns and affiliates." Section 13-801(a) clearly establishes that Section 13-801 creates no additional obligations for affiliates.

This conclusion is further supported by the parallel structure within Section 13-801 which at times refers only to the obligations of the ILEC and at other times refers to the obligations of the ILEC and its "affiliates." Within the body of Section 13-801, the legislature made express distinctions between the ILEC, on the one hand, and its affiliates, on the other. It explicitly imposed obligations relating to the affiliate only in three limited circumstances: 1) Section 13-801(a), which provides that interconnection, collocation or network elements deployed by an ILEC's affiliates are presumed technically feasible in Illinois; 2) Section 13-801(b)(1)(C), which requires the ILEC to provide interconnection that is at least equal in quality and functionality to that provided to itself or its affiliates; and 3) Section 13-801(b)(2), which requires an ILEC to make available facilities and interconnection arrangements that its affiliates offer in other states.

When it came to the definition of "ordinarily combines" in Section 13-801(d)(3), however, the legislature did not insert the term "affiliate." This could only mean that the language of Section 13-801(d)(3) means exactly what it says, *i.e.*, that Ameritech Illinois must offer only those UNE combinations which it "ordinarily combines" for itself. For these reasons, the language sponsored by both the CLEC Coalition and Staff that attempts to expand Ameritech Illinois' obligation with respect to its affiliates must be rejected.

### A. STAFF'S PROPOSED TARIFF

Staff has modified its position on the obligations which arise with respect to Ameritech Illinois' affiliates under Section 13-801. Staff now agrees that the "affiliate" language should be deleted from its proposed definition of "ordinarily combined" in both the UNE combination and EEL portions of the tariff. (Staff Init. Br., p. 53, n. 17 and p. 59, n. 22). Staff has modified its proposed UNE-P and EEL tariff language accordingly, (Staff Init. Br., Attachment 1, Tariff 20, Part 19, Section 15, Sheet 20; Tariff 20, Part 19, Section 15, Sheets 1-8), but did not follow through with all of the tariff changes needed to reflect this change. In particular, there remain two references to "affiliate" in the EEL tariff which relate to the definition of an "ordinarily combined EEL" and which must be deleted.[24] (See Staff Init. Br., Attachment 1, Tariff 20, Part 19, Section 15, Sheet 1).

Staff also has failed to delete the reference to "affiliates" in its Schedule of Rates proposal. Staff readily admits that its Schedule of Rates proposal is designed to implement Section 13-801(d)(3). Since the "affiliate" language is deleted from Staff's definition of ordinarily combined UNEs, it should also be deleted from its Schedule of Rates language. (Staff Init. Br., Attachment 1, Tariff 20, Part 19, Section 1, Sheet No. 3.1).

Next, the following language appears no fewer than five times in Staff's proposed tariff and should be modified to delete the words "or any affiliate":

> The service installation for each specific UNE combination shall be provided consistent with Section 13-801 of the PUA or existing Commission orders. When intervals are not defined, installation shall be provided at parity with the comparable retail service of the Company or any affiliate.

[24] For example, the second paragraph on that page states "An 'Ordinarily Combined' EEL is any combination of the Company's Unbundled Loop and Unbundled Dedicated Transport Network Elements the Company ordinarily combines and uses to provide service to a Company or a Company affiliate's end-user customer, another telecommunications carrier's pre-existing EEL end-user customer, a telecommunications carrier's special access end-user customer, or a telecommunications carrier's resale end-user customer" (emphasis added). The underlined language continues to refer to Ameritech Illinois' affiliates and should be deleted.

Staff mistakenly represents that Ameritech Illinois agrees with this language. (Staff Init. Br. p. 77). That is not true. Ameritech Illinois' proposed language never included the words "or any affiliate." More important, it would be legally improper to adopt Staff's proposal that includes those words. Section 13-801(d)(5) provides, in part:

> The Commission shall establish maximum time periods for the incumbent local exchange carrier's provision of network elements. A maximum time period shall be no longer than the time period for the incumbent local exchange carrier's provision of comparable retail telecommunications services utilizing those network elements.

Under this "parity" standard, the relevant comparison is between the time required to provision UNEs to CLECs and the time required to provision the comparable retail service to the ILEC's own retail customers. There is no standard involving the time in which it takes the ILEC's affiliate to provision the affiliate's retail services to its own customers. For all of the reasons discussed in the initial brief, it makes absolutely no sense to impose performance standards that are derived from the conduct of Ameritech Illinois' affiliates such as Ameritech Advanced Data Services of Illinois, Inc. ("AADS"). (Am. Ill. Init. Br., pp. 131-34). Ameritech Illinois and its affiliates are separate corporations that operate independently. It is irrelevant to Ameritech Illinois how quickly AADS installs retail service to AADS' customers. Moreover, this is a proceeding about Ameritech Illinois' obligations – not about the obligations of any Ameritech Illinois affiliate.

This language should be deleted <u>altogether</u> from at least two sections of the tariff. Staff proposes to insert the above language in five separate tariff sections, including: 1) General Terms and Conditions; 2) Unbundled Loops and HPFL; 3) UNE Combinations; 4) EELs; and 5) End Office Integration Service. Since the language in Section 13-801(d)(5) applies only to <u>network</u>

elements, the language relating to service intervals for UNEs has no place in either the General Terms and Conditions section or the End Office Integration section.

### B. THE CLEC COALITION'S PROPOSED TARIFF

The CLEC Coalition's proposed tariff also references Ameritech Illinois' "affiliates" and these references must be deleted. For example, the General Terms and Conditions section of its tariff includes the following proposed language:

> For the purpose of this tariff, "ordinarily combined" combinations required to be offered by Ameritech Illinois shall include combinations of ordinarily combined for SBC, or any successors, assigns and affiliates of SBC.

(Jt. CLEC Init. Br., Attachment 1, Tariff 20, Part 19, Section 1, Sheet No. 3.4. See, also Section 15, Sheet 2 and Section 20, Sheet 1).

The CLEC Coalition also inserts affiliate language in the resale tariff. In particular, Part 22, Section 1, Sheet No. 1 of its proposed tariff provides, in relevant part: "This part sets forth the local exchange services made available by Illinois Bell Telephone Company ("Company") or any affiliate of SBC Corporation, for resale (resale local exchange services) by a telecommunications carrier." It is unclear what additional obligations the CLEC Coalition has in mind by inserting this reference to "affiliate", but it is clear is that there is no requirement in Section 13-801(f) relating to Ameritech Illinois' affiliates and that the reference to "affiliates" should be deleted.

## XV. AMERITECH ILLINOIS' REVISIONS TO THE GENERAL TERMS AND CONDITIONS ARE JUST AND REASONABLE

In its Initial Brief, Staff has submitted new changes to the General Terms and Conditions of the proposed tariff which Ameritech Illinois is seeing for the first time. These changes come too late in the proceeding to allow Ameritech Illinois to develop and submit testimony and should be rejected for that reason alone. The initial brief is not the proper place to raise new

proposals to include or exclude tariff language[25]. Nonetheless, to the extent it is able, Ameritech Illinois will address these proposed changes and will demonstrate why they should be rejected.

In Tariff 20, Part 19, Section 1, Sheet 4, Staff proposes to recite, verbatim, a portion of Section 13-801(d)(5). Duplication of statutory language in the tariff is unnecessary and creates a real danger of discrepancies between the tariff language and the statutory requirements. It is particularly inappropriate here, where the statute discusses procedural matters and does not involve obligations of Ameritech Illinois. In particular, the quoted language authorizes the Commission to establish (in some other proceeding) delivery intervals for network elements. It also discusses the "burden of proof" to be borne by a carrier that wishes to establish shorter intervals. Clearly, these matters do not deal with current obligations of Ameritech Illinois and have no place in Ameritech Illinois' tariff.

Similarly, in Part 19, Section 1, Sheet 4.1, Staff proposes to insert other language from Section 13-801(d)(5). Although this language favors Ameritech Illinois, it should be stricken for the reasons discussed above.

Another change proposed by Staff for the first time in its brief is the deletion of the "change in law" provision which has been in Ameritech Illinois' tariff for years. (See Attachment 1, p. 3 to this Reply Brief). No party submitted evidence concerning this provision and these is no basis to support Staff's argument that the language will have (or has had) an impact on the development of competition. In the absence of record evidence, Staff's late-filed objections must be rejected. It is also relevant to note that Staff incorrectly quotes the reservations of rights language to which it objects. The correct language is reproduced below[26].

[25] Of course, this is not a problem of a party is making a concession in tariff language, since in that case no one is prejudiced. Staff's new proposals are not concessions, however, they are new obligations.

[26] The language is as follows:

Staff's objections to the language are misplaced. First, Staff argues that the reservation of rights language authorizes Ameritech Illinois to make unrestrained changes to the tariff. (Staff Init. Br., pp. 9-10). It does not. Ameritech Illinois' ability to change its tariff remains fully subject to the review and approval of the Commission and the language does not divest the Commission of its authority in any way. 220 ILCS 5/9-201. Moreover, the language is comparable to "change of law" language which is present in every interconnection agreement approved by this Commission. Set out below is the "change in law" provision from the recently negotiated interconnection agreement with McLeodUSA Telecommunications Services, Inc.[27]

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> In the event that any of the rates and/or other provisions in this Tariff, or any of the laws or regulations that were the basis or rationale for such rates and/or other provision in this Tariff, are invalidated, modified or stayed by any action of any state or federal regulatory or legislative bodies or courts or competent jurisdiction, the Company fully reserves its rights to withdraw, conform, and/or otherwise alter this Tariff or any part hereof, including any rate and/or other provision, consistent with any action of such regulatory or legislative body or court. Such withdrawal, confirmation, and/or other alteration shall become effective upon its filing with the Commission or as soon thereafter as legally permitted and, absent a contrary ruling by the Commission or agreement between the Parties, shall relate back to the effective date of such regulatory, legislative, or court action. Without limiting the general applicability of the foregoing, it applies to AT&T Corp. v. Iowa Utilities Bd., 119 S. Ct. 721 (1999), Ameritech v. FCC, No. 98-1381, 1999 WL 116994, 1999 Lexis 3671 (June 1, 1999), and the Eighth Circuit Court opinion in Iowa Utilities Bd. v. FCC, No. 96-3321, 2000 WL 979117 (8th Cir. , July 18, 2000) (invalidating the costing/pricing rules adopted by the FCC in its First Report and Order in In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 (1996) (e.g., 47 C.F.R. § 51.501, et. seq.)), and any FCC subsequent remand proceedings.

[27] This Agreement is entered into as a result of both private negotiation between the Parties and the incorporation of some of the results of arbitration by the Commissions. In the event that any of the rates, terms and/or conditions herein, or any of the laws or regulations that were the basis or rationale for such rates, terms and/or conditions in the Agreement, are invalidated, modified or stayed by any action of any state or federal regulatory or legislative bodies or courts of competent jurisdiction, including but not limited to any decision by the Eighth Circuit relating to any of the costing/pricing rules adopted by the FCC in its First Report and Order, *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996)(e.g., Section 51.501, et seq.), upon review and remand from the United States Supreme Court, in *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999) or *Ameritech v. FCC*, No. 98-1381, 1999 WL 116994, 1999 Lexis 3671 (June 1, 1999), the affected provision shall be immediately invalidated, modified, or stayed, consistent with the action of the legislative body, court, or regulatory agency upon the written request of either Party. In such event, the Parties shall expend diligent efforts to arrive at an agreement regarding the appropriate conforming modifications to the Agreement. If negotiations fail, disputes between the Parties concerning the interpretation of the actions required or provisions affected by such governmental actions shall be resolved pursuant to the dispute resolution process provided for in this Agreement. Without limiting the general applicability of the foregoing, the Parties acknowledge that on January 25, 1999, the United States Supreme Court issued its opinion in *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999) and on June 1, 1999, the United States Supreme Court issued its opinion in *Ameritech v. FCC*, No. 98-1381, 1999 WL 116994, 1999 Lexis 3671 (1999). In addition, the Parties acknowledge that on November 5, 1999, the FCC issued its Third Report and Order and Fourth Further Notice of Proposed Rulemaking in CC Docket

This clause, and the comparable tariff provision, serve the important function of establishing that current obligations are based on current law, and that as the law changes the tariff obligations will change accordingly (subject, of course, to the Commission's review and approval oversight).

Second, Staff argues that Section 13-406 applies to this situation. For two reasons, it does not. One, most frequently a "change in law" will only *modify* the terms under which an existing UNE, collocation or interconnection arrangement is offered. For example, prices may be modified to reflect the decisions of the Supreme Court and 8th Circuit in the TELRIC proceeding. Modifications of this sort would certainly *not* rise to the level of "discontinuance" of service under Section 13-406. Two, if the FCC decides that a certain UNE no longer meets the "necessary" and "impair" test so that is no longer must be offered by the ILEC, the Commission cannot interfere with the operation of federal law under the guise of Section 13-406 and, in fact, would be preempted from doing so. In other words, Section 13-406 does not create a second hurdle which an ILEC must overcome once federal laws have changed with respect to ILEC obligations for UNEs, collocation or interconnection. None of this detracts, however, from the important purpose Section 13-406 plays in reviewing LEC decisions to discontinue offerings which exist *outside* the pervasive scheme of federal regulation.

For all of these reasons, Ameritech Illinois' reservation of rights language should be retained.

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No. 96-96 (FCC 99-238), including the FCC's Supplemental Order issued *In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996*, in CC Docket No. 96-98 (FCC 99-370) (rel. November 24, 1999), portions of which become effective thirty (30) days following publication of such Order in the Federal Register (February 17, 2000) and other portions of which become effective 120 days following publication of such Order in the Federal Register (May 17, 2000). The Parties further acknowledge and agree that by executing this Agreement, neither Party waives any of its rights, remedies, or arguments with respect to such decisions and any remand thereof, including its right to seek legal review or a stay pending appeal of such decisions or its rights under this Intervening Law paragraph.

There are two defects with other new language proposed by Staff in Part 19, Section 1, Sheet 4.2. The language reads "The service installation interval for each specific UNE loop shall be consistent with Section 13-801(d)(5) of the Illinois PUA or Commission orders dated after July 1, 2001." First, there is no requirement in Section 13-801(d)(5) that the Commission-established intervals be dated after July 1, 2001. This is discussed in more detail in Section X of this brief. Second, there is no basis to find that Ameritech Illinois must meet service intervals established by its affiliates. This is discussed in more detail in Section XIV of this brief.

Finally, as discussed in Ameritech Illinois' initial brief at p. 151, n. 49, Staff's reference in the General Terms and Conditions to "remedies for inferior service" is incorrect because it implies that Ameritech Illinois provides lesser service to others than it does to itself, when in fact remedies are often available when Ameritech Illinois fails to meet a particular benchmark standard. For this reason, the offending language should be revised to read: "See Part 2, Section 10 of this tariff for the objective performance characteristics, how they are measured, and available remedies." (Staff Init. Br., Attachment 1, Tariff 20, Part 19, Section 1, Sheet 4 and Part 23, Section 2, Sheet 4).

## XVI. CONCLUSION

For the reasons discussed herein and in Ameritech Illinois' Initial Brief, the Commission should approve Ameritech Illinois' proposed tariff amendments, as revised in the manner shown in Attachments 1 and 2 to this Reply Brief.

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

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## CERTIFICATE OF SERVICE

I, Karl B. Anderson, an attorney, certify that a copy of the foregoing **REPLY BRIEF OF AMERITECH ILLINOIS** was served on the parties on the attached service list by electronic transmission on February 1, 2002 and by regular U.S. mail on February 4, 2002.

_____

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